SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 490.

OBERLIN M. CARTER, ON THE PETITION OF ARNAS ROSS, APPELLANT AND PLAINTIFF IN ERROR,

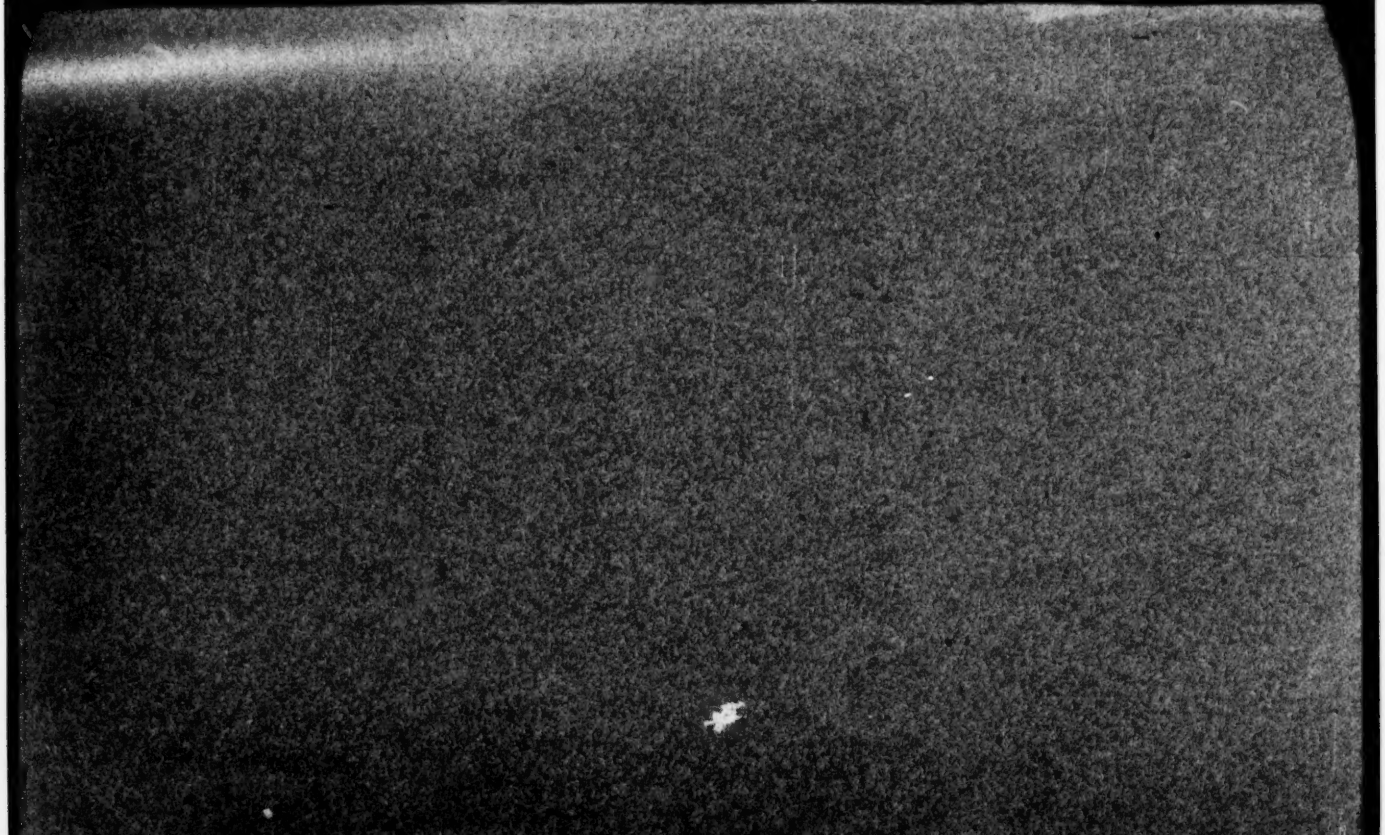
vs.

CAPTAIN BENJAMIN E. ROBERTS.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 26, 1906.

(17,684.)



(17,684.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 570.

OBERLIN M. CARTER, ON THE PETITION OF ABRAM J. ROSE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

CAPTAIN BENJAMIN K. ROBERTS.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	2
Petition for writ of *habeas corpus*	3	2
Writ of *habeas corpus*	7	4
Return to writ of *habeas corpus*	8	5
Exhibit A—Copy of writ of *habeas corpus*	9	6
B—Certified copy of General Orders No. 172, September 29, 1899	11	6
Court-martial proceedings	11	6
Charges and specifications	11	6
Pleas	48	30
Finding	50	31
Sentence	51	32
Order of the President	51	33
Order of General Miles	52	33
Certificate of Adjutant General	52	33
Certificate of Secretary of War	53	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 27, 1900.

	Original.	Print
Traverse to return	53	34
Stipulation as to payment of fine, &c.	54	34
Receipt of assistant treasurer, October 5, 1899	55	35
Opinion of Lacombe, C. J	56	35
Order discharging writ and remanding petitioner	66	41
Assignment of errors	68	41
Petition for appeal	70	43
Allowance of appeal	72	44
Appeal bond	73	44
Citation and service	78	47

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Oberlin M. Carter, on the petition of Abram J. Rose for a writ of *habeas corpus*, and Capt. Benjamin K. Roberts, respondent, a manifest error hath happened, to the great damage of the said petitioner, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 26th day of March, 1900, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26 day of Feb'y, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

2 [Endorsed:] E. & A. B. 1755. Supreme Court of the United States. Oberlin M. Carter, on the petition of Abram J. Rose, plaintiff in error, *vs.* Benjamin K. Roberts, defendant in error. Original. Writ of error. Kellogg, Rose & Smith, attorneys for plaintiff in error. A copy of the within paper has been this day received at this office, Feb. 26, 1900. Henry L. Burnett, U. S. attorney. P. Due service of a copy of the within writ of error is hereby admitted this 27th day of February, 1900. —— ——, U. S. district attorney, attorney for defendant in error. U. S. circuit court. Filed Feb. 26, 1900. John A. Shields, clerk. 1.45, pd.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to 79, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause between Oberlin M. Carter, on the petition of Abram J. Rose for a writ of *habeas corpus*, and Captain Benjamin K. Roberts, respondent, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-first day of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk*.

[Ten-cent U. S. internal-revenue stamp, canceled Mar. 21, 1900.]

3 To the circuit court of the United States for the southern district of New York:

The petition of Abram J. Rose shows:

First: That your petitioner is the attorney for Oberlin M. Carter, who prior to the 29th day of September, 1899, was an officer duly appointed in the Army of the United States, holding the rank of captain of the corps of engineers.

Second. That said Carter is imprisoned and restrained in his liberty in Castle William, Governor's island, in the southern district of New York, in the custody of General Wesley Merritt, commanding the department of the East, United States Army, and by Capt. Benjamin K. Roberts, capt. 5th artillery, commanding Fort Columbus, N. Y.

Third. That he has been committed and is detained by virtue of a sentence imposed upon him by a general court-martial,
4 convened by the President of the United States, which said sentence is as follows: "And the court does therefore sentence the accused Captain Oberlin M. Carter, corps of engineers, United States Army, to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years and the crime, punishment, name and place of abode of the accused to be published in the newspapers in and about the station and the State from which the accused came or where he usually resides."

That said sentence was approved by the Secretary of War and approved and confirmed by the President of the United States on the 29th day of September, 1899.

Fourth. That the cause or pretense of the imprisonment and re-

straint, according to the best knowledge and belief of the petitioner, is that charges and specifications were preferred against said Oberlin M. Carter, under the articles of war, as contained in the Revised Statutes of the United States, charging the said Oberlin M. Carter with conspiracy in violation of the sixtieth article of war, and in presenting false claims in violation of said sixtieth article of war, and with embezzlement, as defined in section 5488 of the Revised Statutes of the United States in violation of the sixtieth article of war, and with conduct unbecoming an officer and a gentleman, in pursuance of which charges and specifications, proceedings were had before the said general court-martial, convened as aforesaid, which terminated in the sentence above mentioned.

Fifth. That it is provided by article 60 of the articles of war, section 1342 of the Revised Statutes of the United States, that every person who shall have been convicted of the offenses of which
5 said Carter was found guilty, "shall on conviction thereof, be punished by fine or imprisonment or by such other punishment as a court-martial may adjudge."

Sixth. That in pursuance of said sentence, said Oberlin M. Carter has been dismissed from the service of the United States Army, and the order of dismissal has been duly personally served upon him, as petitioner is informed and believes, and the crime, punishment, name and place of abode of the accused, has been published in the newspapers in and about the station and the State from which the accused came, and where he usually resides, as your petitioner is informed and believes.

Seventh. That having suffered the punishment of dismissal, and the degradation of the publication of the crime and punishment, as imposed by said sentence, the imprisonment and detention of said Oberlin M. Carter is without authority of law, and the further punishment and detention of said Oberlin M. Carter, and the carrying out of said sentence, is contrary to law and the provisions of the Constitution of the United States and is illegal.

Eighth. That notwithstanding the above facts, the said General Wesley Merritt, Captain Benjamin K. Roberts and persons acting under their orders and authority, are detaining said Oberlin M. Carter in custody and are about to remove him to the military prison at Fort Leavenworth in the State of Kansas to be there confined at hard labor for a period of five years, as imposed by said sentence.

Ninth. That the detention of said Oberlin M. Carter and his proposed removal to Fort Leavenworth, in pursuance of said sentence, is without authority of law, and that any further carrying out of said sentence and the further detention or imprisonment of said Oberlin M. Carter, would be unlawful.

6 Wherefore, your petitioner prays that a writ of *habeas corpus* may issue out of this court, directed to the said General Wesley Merritt, commanding the department of the East, and said Captain Benjamin K. Roberts, commanding them to have the body of said Oberlin M. Carter before this honorable court, as shall be directed in the said writ, so that this court may be able

to proceed thereon, and do what shall appear to them of right ought to be done.

Dated New York, October 2, 1899.

ABRAM J. ROSE, *Petitioner.*

KELLOGG, ROSE & SMITH,
Att'ys for Petitioner.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

Abram J. Rose, being duly sworn, says: That he is the petitioner in this proceeding. That he has read the foregoing petition, and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ABRAM J. ROSE.

Sworn to before me this — day of October, 1899.

ROB'T LAWRENCE,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) U. S. circuit court, southern dist. of New York. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Petition. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. U. S. circuit court. Filed Oct. 2, 1899. John A. Shields, clerk.

7 The President of the United States of America to General Wesley Merritt, general commanding the department of
[L. S.] the East of the United States Army, Governor's island, New York harbor, and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York:

We command you that you have the body of Oberlin M. Carter by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said Oberlin M. Carter shall be called or charged before the circuit court of the United States for the southern district of New York, at the court-house of the said court, in the post-office building in the said city of New York, on the 4th day of October, 1899, at 11 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Oberlin M. Carter, and have you then and there this writ.

Witness Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, the 2d day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN A. SHIELDS,
Clerk Circuit Court of the United States,
Southern District of New York.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Oberlin M. Carter for a writ of *habeas*

corpus. Writ. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. Within writ allowed N. Y. October 2d, 1899. E. Henry Lacombe, U. S. circuit judge. Prisoner remanded
8 to the custody from which he is produced, to be there detained until the questions raised shall be finally decided by this court and decision endorsed hereon. Oct. 4, 1899. E. Henry Lacombe, U. S. circuit judge. The writ being discharged and appeal taken, prisoner is remanded to the custody from which he is produced in conformity to rule 34. Oct. 23, 1899. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Oct. 23, 1899. John A. Shields, clerk.

To the honorable the circuit court of the United States, southern district of New York:

The undersigned, captain of the 5th United States artillery, commanding Fort Columbus, New York, respecifully makes return to the writ, a copy of which is hereto annexed marked "A," and says that he has the custody of the body of Oberlin M. Carter, as the commanding officer of said fort, and that he detains the said Carter, by virtue of instructions from his commanding officer, Major General W. Merritt, commanding the department of the East; that the said Carter is under sentence of a general court-martial, sentenced to be imprisoned at Fort Leavenworth, Kansas, for five years, and that the said Carter is now in custody, as aforesaid, while awaiting transportation to the aforesaid fort; and your respondent says he is acting in his capacity as such officer by virtue of general orders No. 172, headquarters of the army, adjutant general's office, Washington, D. C., September 29, 1899, the same containing the charges and specifications under and by virtue of which the said Carter was tried; the findings of the general court-martial; the sentence of the said Carter by the same; the approval of the findings of said court-martial with the exceptions stated in such orders by the Secretary of War; the approval of the sentence by the latter, and the
9 approval and confirmation by the President; and your respondent respectfully calls attention to said general orders, a duly authenticated copy of which, marked B, is filed herewith; and the attention of the court is respectfully invited thereto, the contention of respondent being that the said Carter has been lawfully convicted and sentenced by the said general court-martial, which had jurisdiction of the person of said Carter, and of the various offenses for which he was tried.

In obedience to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said Oberlin M. Carter, but for the reasons set forth prays this honorable court to dismiss the said writ.

BENJAMIN K. ROBERTS,
Captain Fifth U. S. Artillery, Commanding
Fort Columbus, New York Harbor.

New York city, N. Y., October 4, 1899.

(Copy.)

"A."

The President of the United States of America to General Wesley Merritt, general commanding the department of the East [L. S.] of the United States Army, Governor's island, New York harbor, and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York:

We command you that you have the body of Oberlin M. Carter by you imprisoned and detained, as it is said, together with 10 the time and cause of such imprisonment and detention by whatsoever name the said Oberlin M Carter shall be called or charged before the circuit court of the United States for the southern district of New York at the court-house of the said court, in the post-office building, in the said city of New York, on the 4th day of October, 1899, at 11 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Oberlin M. Carter, and have you then and there this writ.

Witness Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, the 2d day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN A. SHIELDS,
Clerk Circuit Court of the United States,
Southern District of New York.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Oberlin M. Carter for a writ of *habeas corpus*. Writ. Kellogg, Rose & Smith, att'ys for petitioner, 120 B'way, New York. Within writ allowed. N. Y., Oct. 2, 1899. E. Henry Lacombe, U. S. circuit court judge. U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

11 "B."

General Orders No. 172.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *September* 29, 1899.

Before a general court-martial which convened at Savannah, Georgia, pursuant to special orders No. 282, of December 2, 1877; special orders No. 306, of December 31, 1897, and special orders No. 1, of January 3, 1898, from headquarters of the army, adjutant general's office, and of which Brigadier General Elwell S. Otis, United States Army, was president, and Colonel Thomas F. Barr, assistant judge advocate general, was judge advocate, was arraigned and tried Captain Oberlin M. Carter, corps of engineers.

Charge I: "Conspiring to defraud the United States, in violation of the 60th article of war."

Specification I. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, devising and intending to defraud the

United States, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, on or about August 1, 1892, and thereafter to June 6, 1896, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said corporation and persons to obtain the allowance and payment of certain false
12 and fraudulent claims indicated by the payments hereinafter alleged to have been made; and in pursuance of the said conspiracy the said Captain Oberlin M. Carter, in the months of August and September, 1892, being the officer of the United States in local charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in Cumberland sound, in said district, and so manage and conduct such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said Edward H. Gaynor to secure the contract for said work and to have the same entered into by the United States with him, September 16, 1892; and in further pursuance of the said conspiracy the said Edward H. Gaynor afterwards, to wit, from about the 16th day of September, 1892, to the 25th day of May, 1893, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said Edward H. Gaynor, as well as of less value to the United States, which said mattresses, stone and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept and cause to be received and accepted for the United States as and for the mattresses, stone, and other material contracted for, and did cause payments to be made out of the moneys of the United States to the said Edward H. Gaynor on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates
13 named: November 17, 1892, $1,713.23; December 16, 1892, $21,102.67; December 31, 1892, $24,529.95; January 5, 1893, $493.59; February 4, 1893, $20,274.07; March 6, 1893, $16,433.14; April 3, 1893, $14,218.86; May 2, 1893, $27,436.06; May 22, 1893, $9,337.85; and May 25, 1893, $26,706.46.

"And in further pursuance of the said conspiracy the said Captain Carter, about August, September, and October, 1892, did advertise for proposals for a contract for improving the harbor at Savannah, Georgia, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giv-

ing out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 22, 1892; and in further pursuance of the said conspiracy the said The Atlantic Contracting Company, from about the 22d day of October, 1892, to the 4th day of May, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States, which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive and accept and cause to be received and accepted for the United States, as and for the mattresses, stone and other material contracted for, and did cause payments to be made out of the moneys of the United States, as to the said The Atlantic Contracting Company, on account of the said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same
14 rate, cost, and price as if they had been, as follows, and on or about the dates named: November 17, 1892, $3,265.61; December 3, 1892, $15,000.00; December 16, 1892, $8,507.45; December 31, 1892, $20,000.00; January 10, 1893, $25,416.81; February 4, 1893, $42,722.83; February 8, 1893, $15.71; March 6, 1893, $44,985.47; March 31, 1893, $38,076.11; April 3, 1893, $20,584.51; May 2, 1893, $30,000.00; May 31, 1893, $6,105.69; July 3, 1893, $5,968.18; July 3, 1893, $34,177.94; July 3, 1893, $46,592.39; August 3, 1893, $57,013.64; September 1, 1893, $97,159.99; October 2, 1893, $59,554.84; November 3, 1893, $52,452.22; December 1, 1893, $85,752.28; January 2, 1894, $44,175.02; January 5, 1894, $27,057.00; February 2, 1894, $75,118.71; March 1, 1894, $44,630.22; July 7, 1894, $202,481.40; September 8, 1894, $481,933.67; October 2, 1894, $88,922.63; November 9, 1894, $44,303.92; December 5, 1894, $38,903.72; January 11, 1895, $39,368.67; February 1, 1895, $31,659.28; March 2, 1895, $25,612.62; April 5, 1895, $63,656.50, and May 4, 1895, $19,860.08.

"And in further pursuance of the said conspiracy the said Captain Carter, about January, February, and March, 1893, did advertise for proposals for a contract for improving Jekyl creek, Georgia, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it, March 1, 1893; and in further pursuance of said conspiracy the said The Atlantic Contracting Company, from about the 1st day of March, 1893, to about the 3d day of July, 1893, did furnish and put into said work certain mattresses, stone,

and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less
15 value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted, for the United States and as and for the mattresses, stone, and other material contracted for, and did cause payments to be made out of the moneys of the United States to the said The Atlantic Contracting Company on account of said furnishing and delivering of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates names: June 3, 1893, $3,309.40; July 3, 1893, $3,595.38, and July 3, 1893, $14,591.00.

"And in further pursuance of the said conspiracy the said Captain Carter, about August, September, October, and November, 1894, did advertise for proposals for improving Cumberland sound, in said river and harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said Anson M. Bangs to secure the contract for said work and to have the same entered into by the United States with him, November 15, 1894; and in further pursuance of the said conspiracy the said Anson M. Bangs, from about the 15th day of November, 1894, to about the 4th day of May, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said Anson M. Bangs, as well as of less value to the United States; which said mattresses, stone and other material so furnished and put into the work, the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be re-
16 ceived and accepted for the United States as and for the mattresses, stone, and other material contracted for; and did cause payments to be made out of the moneys of the United States to the said Anson M. Bangs, on account of said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: December 5, 1894, $874.73; January 11, 1895, $9,845.35; February 1, 1895, $17,800.50; March 2, 1895, $21,287.65; April 5, 1895, $29,659.82, and May 4, 1895, $32,059.92.

"And in further pursuance of the said conspiracy the said Captain Carter, about March and April, 1895, did advertise for proposals for improving Altamaha river, Georgia; Darien harbor, Georgia; Jekyl creek, Georgia, and inside water route between Savannah, Georgia, and Ferdinanda, Florida, in said river and

harbor district, and did so manage and conduct the matter of such advertising and the matter of giving out information in regard to the contract to be let and the matter of receiving proposals and awarding the contract as to enable the said William T. Gaynor to secure the contract for said work and to have the same entered into by the United States with him April 20th, 1895, and in further pursuance of said conspiracy the said William T. Gaynor, from about the 20th day of April, 1895, to about the 1st day of July, 1895, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said William T. Gaynor, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work, the said Captain Carter, in further pursuance of the conspiracy, did receive and accept, and cause to be received and accepted for the United States as and for the mattresses, stone, and other ma-
17 terial contracted for; and did cause payments to be made out of the moneys *to* the United States to the said William T. Gaynor on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been, as follows, and on or about the dates named: June 4, 1895, $17,728.81, and July 1, 1895, $27,861.32."

Specification II. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, devising and intending to defraud the United States and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims hereinafter described; and in pursuance of the said conspiracy the said Oberlin M. Carter, in the months of June, July, and August, September, and October, 1896, being an officer of the United States in local charge of the river and harbor district usually called the Savannah district, and of the improvement by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvement in the harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to
18 secure the contract for said work, and to have the same entered into by the United States with it October 8th, 1896; and in further pursuance of the said conspiracy the said The At-

lantic Contracting Company afterwards, to wit, from about the 8th day of October, 1896, to July 31st, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6th, 1897, cause to be paid, out of the moneys of the United States, $230,749.90 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

"And in further pursuance of the said conspiracy the said Captain Carter, about June, July, August, September, and October, 1896, did advertise for proposals for a contract for improving Cumberland sound, Georgia, in said river and harbor district, and so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8th, 1896; and in further pur-
19 suance of the said conspiracy the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain mattresses, stone, and other material which were different in kind and character from the mattresses, stone, and other materials contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone, and other material so furnished and put into the work the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone, and other material contracted for; and did, on or about July 6th, 1897, cause to be paid, out of the moneys of the United States, $345,000.00 to the said The Atlantic Contracting Company, on account of said furnishing and delivery of the same, and as if the said mattresses, stone, and other material had been such as were stipulated for in the contract, and at the same rate, cost, and price as if they had been.

"This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

Charge II: "Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war."

Specification I. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor districts, did cause to be made certain false and fraudulent claims against the United States and in favor of Edward H. Gaynor, knowing the same to be false and fraudulent, to wit: The claims represented by the following vouchers, submitted by
20 the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 18, for $1,713.23, November, 1892;
Voucher No. 13, for $21,102.67, December, 1892;
Voucher No. 20, for $24,529.95, December, 1892;
Voucher No. 26, for $493.59, January, 1893;
Voucher No. 3, for $20,274.07, February, 1893;
Voucher No. 2, for $16,433.14, March, 1893;
Voucher No. 1, for $14,218.86, April, 1893;
Voucher No. 2, for $27,436.06, May, 1893;
Voucher No. 5, for $9,937.85, May, 1893;
Voucher No. 6, for $26,706.46, May, 1893;

which said false and fraudulent claims the said Captain Carter caused so be made, by knowingly permitting Edward H. Gaynor, who had previously entered into a contract, dated September 16, 1892, to furnish to the United States certain mattresses, stone, and other materials of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for, and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished, each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification II. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor districts, did cause to be made certain false and fraudulent claims against the United States and in favor of the
21 Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit, the claims represented by the following vouchers submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1894;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

22 which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into a contract dated October 2, 1892, to furnish the United States certain mattresses, stone, and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in above description of the voucher relating to it."

Specification III. "In that Oberlin M. Carter, corps of engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: Claims represented by the following vouchers submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia:'

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, July, 1893;

and by following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving
23 waterway between Savannah, Georgia, and Ferdinanda, Florida. Applied to that work at Jekyl creek, Georgia:'

Voucher No. 1, $14,591.00, July, 1893;

which said false and fraudulent claims the said Captain Carter caused to be made, by knowingly permitting the said Atlantic Contracting Company, which had previously entered into a contract dated March 1, 1893, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification IV. "In that Captain Oberlin M. Car*lin*, corps of engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of Anson M. Bangs, knowing the same to be false and fraudulent, to wit: The claims represented by the following vouchers submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia:'

Voucher No. 13, $874.73, December, 1894;
Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

24 and by the following vouchers submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Anson M. Bangs, who had previously entered into a contract, dated November 15, 1894, to furnish the United States certain mattresses, stone and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said work mattresses, stone and other material, different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification V. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of William T. Gaynor, knowing the same to be false and fraudulent, to wit: The claims represented by the following voucher submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Darien, Georgia;'

Voucher No. 16, $17,728.81, June, 1895;

and by the following voucher submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia; improving Altamaha river, Georgia; improving waterway between Savannah, Georgia, and Ferdinanda, Florida; improving Jekyl creek, Georgia:'

Voucher No. 14, $27,861.32, July, 1895;

which said false and fraudulent claims the said Captain Carter caused to be made, by knowingly permitting William T. Gaynor, who had previously entered into a contract dated April 20, 1895, to furnish the United States certain mattresses, stone, and other materials, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said work mattresses, stone, and other material, different from, inferior to, cheaper, and of less value to the United States than those contracted for, and by receiving and accepting and paying for the same as of kinds and qualities contracted for, and by falsely certifying to the correctness of said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VI. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being at the time the officer in local charge of river and harbor improvements in the Savannah river

and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of the Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit: The claim represented by the following voucher, submitted by the said Captain Carter with his accounts, and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

26 and the claim represented by the following voucher, submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 9, $345,000.00, July, 1897;

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said Atlantic Contracting Company, which had previously entered into contracts, dated October 8, 1896, to furnish the United States certain mattresses, stone, and other material, of specified kinds and qualities, for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone, and other material different from, inferior to, cheaper, and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone, and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

Specification VII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement in the Savannah district, did cause to be prepared a pay-roll, the same being voucher No. 30 to his account with the United States for the month of December, 1896, appropriation for improving the harbor at Savannah, Georgia, upon which voucher the said Carter did cause to be entered the names of certain persons, hereinafter named, as laborers, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said persons, according to said voucher, knowing the same to be false and

27 fraudulent, for services as laborers during the month of December, 1896, the following amounts to wit: To William Naylor the sum of one dollar ($1.00); to H. Roberts the sum of four dollars ($4.00); to D. A. Holland the sum of four dollars and fifty cents ($4.50); to S. G. Vinson the sum of twelve dollars and twenty-five cents ($12.25); to P. H. Cotton the sum of six dollars and fifty cents ($6.50); to J. D. Robinson, Jr., the sum of fifty cents ($0.50); the claims for such services being false and fraudulent in that none of the said persons had rendered services as laborers as set forth in

said voucher; and he, the said Carter, well knowing that such claims were false and fraudulent.

"This at Savannah, Georgia, on or about December 21, 1896."

Specification VIII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the Savannah district, did cause to be entered on voucher No. 5 of his account with the United States for the month of January, 1897, appropriation for improving harbor at Savannah, Georgia, among other things, an account against the United States for the construction by the Atlantic Contracting Company, during the month of December, 1896, of seventy-six (76) linear feet of piling in repairing the Garden Bank training wall near Savannah, Georgia, at $1.60 per linear foot, amounting to $121.60, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of one hundred and twenty-one dollars and sixty cents ($121.60), the said claim being false and fraudulent, in that only forty-eight (48) linear feet of the piling charged in said account was actually constructed, and the service actually rendered as to the other twenty-eight
28 (28) feet charged for was not the construction of piling in repairing said training wall, but was the driving of seven (7) guide-piles for sinking mattresses, the said guide-piles having been driven by the said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about January 12, 1897."

Specification IX. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, did cause to be entered on voucher No. 27 to his account with the United States for the month of March, 1897, appropriation for improving harbor at Savannah, Georgia, on account against the United States for the construction by the Atlantic Contracting Company, during the month of February, 1897, of two hundred and forty (240) linear feet of pile-work in repairing training walls near Savannah, Georgia, at $1.60 per linear foot, amounting to $384.00, and did cause to be presented to him, the said Captain Carter, for payment, and did cause to be paid to the said Atlantic Contracting Company, according to said voucher, a claim against the United States in the sum of three hundred and eighty-four dollars ($384.00); the said claim being false and fraudulent, in that the service actually rendered was not the construction of two hundred and forty (240) linear feet of pile-work in repairing said training walls, but was the driving of sixty guide-piles for sinking mattresses, the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses, and he, the said Captain Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about the tenth day o March, 1897."

Specification X. "In that Captain Oberlin M. Carter, corps o engineers, United States Army, being the engineer officer in loca charge of the works of river and harbor improvement of the Sa vannah district, did cause to be entered on voucher No. 21 to hi account with the United States for the month of June, 1897, appro priation for improving harbor at Savannah, Georgia, an accoun against the United States for the construction by the Atlantic Con tracting Company, during the month of May, 1897, of sixty-eigh (68) linear feet of pile dams in repairing training walls and spu dams near Savannah, Georgia, at $1.60 per linear foot, amounting to $108.80, and did cause to be presented to him, the said Captai Carter, for payment, and did cause to be paid to the said Atlanti Contracting Company, according to said voucher, a claim agains the United States in the sum of one hundred and eight dollars an eighty cents ($108.80); the said claim being false and fraudulen in that the service actually rendered was not the construction o sixty-eight (68) linear feet of pile dams in repairing said trainin walls and spur dams, but was the driving of seventeen (17) guide piles for sinking mattresses; the said guide-piles having been drive by said Atlantic Contracting Company for itself and its sole use an convenience in sinking said mattresses; and he, the said Captai Carter, well knowing that said claim was false and fraudulent.

"This at Savannah, Georgia, on or about the nineteenth day o June, 1897."

Charge III: "Conduct unbecoming an officer and a gentleman, i violation of the 61st article of war."

Specification I. "In that Captain Oberlin M. Carter, corps o engineers, United States Army, being the officer in loca charge for the United States of river and harbor improve ments in the Savannah river and harbor district, did willfull and knowingly cause the following amounts to be paid, out of th moneys of the United States subject to his order and control as suc officer in charge of said improvements, the accounts on which th same were paid being false, the amounts paid not being due o owing from the United States to the parties paid or to any one, an he, the said Captain Carter, well knowing this to be the case; th said accounts, the amounts paid, and the payments being thos designated by the following vouchers (and the entries therein an endorsements thereon) submitted by the said Captain Carter wit his accounts, and marked 'Appropriation for improving Cumber land sound, Georgia and Florida:'

Voucher No. 18, $1,713.23, November, 1892;
Voucher No. 13, $21,102.67, December, 1892;
Voucher No. 20, $24,529.95, December, 1892;
Voucher No. 26, $493.59, January, 1893;
Voucher No. 3, $20,274.07, February, 1893;
Voucher No. 2, $16,433.14, March, 1893;

Voucher No. 1, $14,218.86, April, 1893;
Voucher No. 2, $27,436.06, May, 1893;
Voucher No. 5, $9,337.85, May. 1893;
Voucher No. 6, $26,706.46, May, 1893;

and those indicated and designated by the following vouchers, and the entries therein and endorsements thereon, submitted by the said Captain Carter with his accounts and marked 'Appropriations for improving harbor at Savannah, Georgia:'

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
31 Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1894;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.92, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Jekyl creek, Georgia:'

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 1, $3,595.38, July, 1893;

and the one indicated and designated by the following voucher (and

the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, applied to that work at Jekyl creek, Georgia:'

Voucher No. 1, $14,591.00, July, 1893;

32 and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia:'

Voucher No. 12, $874.73, December, 1894;
Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia:'

Voucher No. 16, $17,728.81, June, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia; improving Altahama river, Georgia; improving waterway between Savannah, Georgia, and Ferdinanda, Florida; improving Jekyl creek, Georgia:'

Voucher No. 14, $27,861.32, July, 1895;

and the said Captain Carter causing each of the said payments to be made in or about the month named in the above description of the voucher relating to it, by drawing and delivering a check as such officer in charge of river and harbor improvements, by which he ordered and directed that the amount indicated be paid out of the moneys of the United States then under his control as such officer."

33 Specification II. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did willfully and knowingly cause the following amounts to be paid out of the moneys of the United States subject to his order and control as officer in charge of said improvements to the Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United

ates to the said company, or to any one, and he, the said Captain arter, well knowing this to be the case; the said accounts and nounts paid and the payments being those designated by the fol- wing voucher (and the entries therein and endorsements thereon), ubmitted by the said Captain Carter with his accounts and marked Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 8, $230,749.90, July, 1897;

nd the one indicated and designated by the following voucher (and he entries therein and endorsements thereon), submitted by the aid Captain Carter with his accounts and marked 'Appropriation or improving Cumberland sound, Georgia and Florida:'

Voucher No. 9, $345,000, July, 1897;

ach of the said payments having been caused to be made on or bout July 6, 1897, by the said Captain Carter drawing and deliv- ering a check as such officer in charge of river and harbor improve- nents, by which the payment was ordered and directed to be made ut of moneys of the United States under his control as such fficer."

Specification III. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in 34 local charge of the works of river and harbor improvement of the Savannah district, did, at Savannah, Georgia, on or about December 31, 1896, in submitting to the Chief of Engineers, United States Army, a comparative estimate of the cost of improv- ing Savannah harbor, in which estimate there was an item of '360,000 square yards brush mattresses,' make the following state- ment regarding said item:

"'In the specifications only 200,000 square yards of mattresses are given, but as new soundings show that 300,000 square yards will be required, this estimate has been changed as provided in par. 44 of the specifications.'

"Meaning by the word 'specifications' the specifications to the contract with the Atlantic Contracting Company, for improving Savannah harbor, dated October 8, 1896, which statement was false in fact, as no new soundings had been made between June 6, 1896, the date of said specifications and said date of making said false statement, and which statement was known by him (the said Cap- tain Carter) to be false in fact and was intended to deceive."

Specification IV. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the United States in the Savannah district, having caused to be prepared a pay- roll, the same being voucher No. 30 to his account with the United States for the month of December, 1896, appropriation for improv- ing harbor at Savannah, Georgia, and having caused to be entered on said voucher the names of certain persons as laborers during the month of December, 1896, and having caused to be paid to said persons divers sums amounting in all to twenty-nine dollars and

fifty cents ($29.50), did make and sign the following certificate on said voucher, to wit:

35 "'I certify that the above pay-roll is correct and just, and the "days" for which payments have been made were days of eight hours each.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false and fraudulent in that none of said persons had rendered services as laborers as set forth in said voucher No. 30; and which certificates *were* known by him, the said Captain Carter, to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about December 21, 1896."

Specification V. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the Savannah district, having caused to be entered on voucher No. 5 to his account with the United States for the month of January, 1897, appropriation for improving Savannah harbor, at Savannah, Georgia, among other things, an account against the United States, for the construction by the Atlantic Contracting Company, during the month of December, 1896, of seventy-six (76) linear feet of piling in repairing the Garden Bank training wall, near Savannah, Georgia, at $1.60 per linear foot, amounting to $121.60, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just; the articles have been expended and applied to the purpose for which purchased. The mode of expenditure adopted was most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which certificate was false in fact in that only forty-eight (48) linear feet of the piling charged in said account was actually constructed, and the service actually rendered as to the other twenty-eight
36 (28) feet charged for was not the construction of piling in repairing said training wall, but was the driving of seven (7) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificates was well known by the said Carter to be false in fact, and was intended to deceive.

"This at Savannah, Georgia, on or about January 12, 1897."

Specification VI. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, having caused to be entered on voucher No. 27 to his account with the United States for the month of March, 1897, appropriation for improving the harbor at Savannah, Georgia, an account against the United States for the construction, by the Atlantic Contracting Company, during the month of February, 1897,

of two hundred and forty (240) linear feet of pile-work in repairing training walls near Savannah, Georgia, at $1.60 per linear foot, amounting to $384, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just; the articles have been expended and applied to the purpose for which purchased. The mode of expenditure adopted was most economical and advantageous to the Government.

O. M. CARTER,
Capt. Corps of Engineers.'

which said certificate was false in fact, in that the service actually rendered was not the construction of two hundred and forty (240) linear feet of pile-work in repairing said training walls, but was the driving of sixty (60) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting
37 Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact and was intended to deceive.

"This at Savannah, Georgia, on or about the tenth day of March, 1897."

Specification VII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvement of the Savannah district, having caused to be entered in voucher No. 21 to his account with the United States for the month of June, 1897, appropriation for improving harbor at Savannah, Georgia, an account against the United States for the construction by the Atlantic Contracting Company during the month of May, 1897, of sixty-eight (68) linear feet of pile dams in repairing training wall and spur dams near Savannah, Georgia, at $1.60 per linear foot, amounting to $108.80, did make and sign the following certificate on said voucher, to wit:

"'I certify that the above account is correct and just. The mode of expenditure adopted was the most economical and advantageous to the Government.

O. M. CARTER,
Capt., Corps of Engineers.'

which certificate was false in fact, in that the service actually rendered was not the construction of sixty-eight (68) linear feet of pile dams in repairing said training walls and spur dams, but was the driving of seventeen (17) guide-piles for sinking mattresses; the said guide-piles having been driven by said Atlantic Contracting Company for itself and its sole use and convenience in sinking said mattresses; and which said certificate was well known by the said Carter to be false in fact and was intended to deceive.

"This at Savannah, Georgia, on or about the nineteenth day of June, 1897."

38 Specification VIII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, devising and intending to defraud the city of Savannah, Georgia, and to aid the Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Anson M. Bangs, and divers other persons, all of whom were likewise with him; the said Captain Carter devising and intending to defraud the said city, did, on or about February 20, 1896, and thereafter to June 30, 1896, with the said company and the persons named, unlawfully combine and conspire to defraud the said city of divers large sums of money, and to wrongfully compel it, the said city, to dispose of certain valuable rock owned by it, under unfavorable circumstances to it, in order that the said Atlantic Contracting Company might be enabled to purchase the same from the city at a price far below the real cost and value of the same; and in pursuance of the said conspiracy, the said Captain Carter, during the months of February, March, April, May, and June, 1896, being the officer of the United States in charge of the river and harbor district, usually called the Savannah district and of the improvements by the United States of rivers and harbors in said district in which the said rock was situated (in a body of navigable water, and outside of the harbor lines of the same, by and under the revocable permission of the Secretary of War), did use his said position as officer in charge of said district and improvements, and the powers and influence of the same, to have the Secretary of War revoke the said permission and require the said city to remove its said rock from the position occupied by it in the harbor; the means used by him to accomplish this being, among other things, false and misleading statements in letters to his superior officers, and in endorsements on letters referred to him from the War Department, as to the necessity for prompt and speedy removal of the said rock from the position occupied by it in the harbor; and also like statements and other representa-
39 tions made by him to various officials of the said city, and others, orally and in writing."

Specification IX. "In that Oberlin M. Carter, corps of engineers, United States Army, being the officer in charge of the Savannah river and harbor district, and having been required by the Chief of Engineers, United States Army, by the endorsement on the letter of one Paulding, to furnish information in regard to the proposed acquisition by the United States of certain lands on Hutchinson's island, near Savannah, Georgia, for river and harbor improvement purposes, did, in an endorsement of said letter, dated October 21, 1896, state as follows, to wit:

"'When operations were to begin excessive rentals were demanded by property-owners, some of whom had taken possession of wharves as a speculation with a view to obtaining excessive damages. The work would have been delayed and its cost increased by about $50,000, and it was therefore abandoned;' which said statement was false, and was known to him, the said Captain Carter, to be false, and was intended by him to deceive Brigadier General William P. Craighill, Chief of Engineers, United States Army.

"This at Savannah, Georgia, on or about October 21, 1896."

Specification X. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being duly sworn as a witness for the defendant in the case of James B. Brown *vs.* The Atlantic Contracting Company, then pending in the city court of Savannah, Georgia, in which the subject-matter of the litigation was certain rock said to have been delivered by the said Brown to the said company, and then by the company to the United States, to go into certain river and harbor improvements carried on under the said Captain Carter as officer in charge for the United States, did testify on oath in regard to said rock to the effect that the United
40 States did not receive and pay for it, but that they merely allowed the company to dump the same into the works along with the rock received and paid for, the said company not being paid for it; which said testimony was false, in that the United States had received and paid said company for it, and was well known by the said Captain Carter to be false, and was intended by him to deceive the said court and its jury impaneled to try the said case.

"This at Savannah, Georgia, on or about March 15, 1897."

Specification XI. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the engineer officer in local charge of the works of river and harbor improvements of the United States in the Savannah district, and having received from one Alfred Hirt, for the United States, on or about December —, 1896, the sum of one hundred and thirty-two dollars and ten cents ($132.10) on account of delay of said Hirt in returning, and expense of returning, a diving outfit belonging to the United States and pertaining to the United States snag-boat Satilla, did fail to account, and has failed to account, to the United States for the said sum, or any part thereof, from the time of receiving said sum to the present time, viz., December 10, 1897."

Specification XII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being in the city of New York, on or about the 25th day of May, 1897, did, while there, cause a telegram to be sent to the Secretary of War, purporting to come from him in Savannah, Georgia, whereby he intended to deceive the Secretary of War as to where he, the said Captain Carter, was on that date.

"This at New York, on or about May 25, 1897."

Specification XIII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, having left Savannah,
41 Georgia, on or about the 2nd day of August, 1894, and having gone to the State of Montana, did on the 16th day of August, 1894, cause a letter to be forwarded to the Chief of Engineers, United States Army, dated Savannah, Georgia, reporting his, the said Captain Carter's departure from Savannah on that day, whereby he intended to deceive Brigadier General Thomas L. Casey, Chief of Engineers, United States Army.

"This in Montana, on or about August 16th, 1894."

Specification XIV. "In that Captain Oberlin M. Carter, corps of

engineers, United States Army, in a personal report of himself as such officer, made to the Chief of Engineers, United States Army, for the month of April, 1894, did report himself present at his station from the 3rd to the 7th day of April, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about April 30th, 1894."

Specification XV. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of August, 1894, did report himself present at his station from the 3rd to the 15th day of August, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York, St. Paul, and Yellowstone national park); and which report was well known to him to be false, and was intended to deceive.

"This on or about August 31st, 1894."

Specification XVI. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States
42 Army, for the month of September, 1894, did report himself present at his station from the 23rd to the 27th day of September, 1894, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in Cincinnati, Ohio); and which report was well known to him to be false and was intended to deceive.

"This on or about September 30, 1894."

Specification XVII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of October, 1894, did report himself as present at his station on the 4th and 5th days of October, 1894, which said report was false, in that he was absent from his station during said days, and which report was well known to him to be false, and was intended to deceive.

"This on or about October 31, 1894."

Specification XVIII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of November, 1894, did report himself present at his station on the 11th and 12th days of November, 1894, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about November 30, 1894."

Specification XIX. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of December, 1894, did report himself present at his station from the 8th to the 12th day of December, 1894, both in-

clusive, and from the 24th to the 31st day of December,
43 1894, both inclusive, which said report was false, in that he was absent from his station during said times (parts of them in New York); and which report was well known to him to be false and was intended to deceive.

"This on or about December 31, 1894."

Specification XX. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of January, 1895, did report himself present at his station from the 1st to the 9th day of January, 1895, both inclusive, which said report was false, in that he was absent from his station during said time (part of it in New York); and which report was well known to him to be false, and was intended to deceive.

"This on or about January 31, 1895."

Specification XXI. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of July, 1895, did report himself present at his station from the 3d to the 9th day of July, 1895, both inclusive, which said report was false, in that he was absent from his station during the said time (part of it in New York), and which report was well known to him to be false and was intended to deceive.

"This on or about July 31, 1895."

Specification XXII. "In that Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of March, 1897, did report himself present at his station from the second to the ninth day of March, 1897, both inclusive, which said report was false in that he was absent from his station during said time (part of it in New York); and which report
44 was well known to him to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about the 31st day of March, 1897."

Specification XXIII. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, in a personal report of himself as such officer made to the Chief of Engineers, United States Army, for the month of May, 1897, did report himself present at his station on the 24th day of May, 1897, which said report was false, in that he was absent from his station on said day (and was in New York), and which report was well known to him to be false, and was intended to deceive.

"This at Savannah, Georgia, on or about May 31, 1897."

Charge IV: "Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war."

Specification I. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the officer in charge for the

United States of river and harbor improvements in the Savannah river and harbor district, and, as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did willfully and knowingly apply for a purpose not authorized by law large sums of the said moneys so entrusted to him, by willfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control of such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and
45 the payments being those designated by the following voucher (and the entries therein and the endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia.'

Voucher No. 8 ($230,749.90), July, 1897;

and the one indicated and designated by the following voucher (and the entries therein and indorsements thereon), submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida.'

Voucher No. 9 ($345,000.00), July, 1897;

each of the said payments having been caused to be made on or about July 6, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of the moneys of the United States under his control as such officer."

Specification II. "In that Captain Oberlin M. Carter, corps of engineers, United States Army, being the officer in charge for the United States of river and harbor improvements in the Savannah river and harbor district, and as such officer in charge of said improvements, being a disbursing officer of the United States, and having entrusted to him large amounts of public money of the United States, did willfully and knowingly apply, for a purpose not authorized by law, large sums of the said moneys so entrusted to him, by willfully and knowingly causing the following amounts to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid,
46 or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payments being those designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 18, for $1,713.23, November, 1892;
Voucher No. 13, for $21,102.67, December, 1892;
Voucher No. 20, for $24,529.95, December, 1892;
Voucher No. 26, for $493.59, January, 1893;
Voucher No. 3, for $20,274.07, February, 1893;
Voucher No. 2, for $16,433.14, March, 1893;
Voucher No. 1, for $14,218.86, April, 1893;
Voucher No. 2, for $27,430.06, May, 1893;
Voucher No. 5, for $9,337.85, May, 1893;
Voucher No. 6, for $26,706.46, May, 1893;

and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Savannah, Georgia:'

Voucher No. 11, $3,265.61, November, 1892;
Voucher No. 2, $15,000.00, December, 1892;
Voucher No. 24, $8,507.45, December, 1892;
Voucher No. 28, $20,000.00, December, 1892;
Voucher No. 3, $25,416.81, January, 1893;
Voucher No. 1, $42,722.83, February, 1893;
Voucher No. 3, $15.71, February, 1893;
Voucher No. 2, $44,985.47, March, 1893;
Voucher No. 8, $38,076.11, March, 1893;
Voucher No. 2, $20,584.51, April, 1893;
Voucher No. 4, $30,000.00, May, 1893;
Voucher No. 28, $6,105.69, May, 1893;
Voucher No. 3, $5,968.18, July, 1893;
Voucher No. 4, $34,177.94, July, 1893;
Voucher No. 5, $46,592.39, July, 1893;
Voucher No. 2, $57,013.64, August, 1893;
Voucher No. 1, $97,159.99, September, 1893;
Voucher No. 1, $59,554.84, October, 1893;
47 Voucher No. 1, $52,452.22, November, 1893;
Voucher No. 2, $85,752.28, December, 1893;
Voucher No. 1, $44,175.02, January, 1894;
Voucher No. 2, $27,057.00, January, 1894;
Voucher No. 4, $75,118.71, February, 1894;
Voucher No. 6, $44,630.22, March, 1894;
Voucher No. 7, $202,481.40, July, 1895;
Voucher No. 10, $481,933.67, September, 1894;
Voucher No. 7, $88,922.63, October, 1894;
Voucher No. 48, $44,303.91, November, 1894;
Voucher No. 11, $38,903.72, December, 1894;
Voucher No. 41, $39,368.67, January, 1895;
Voucher No. 7, $31,659.28, February, 1895;
Voucher No. 10, $25,612.62, March, 1895;
Voucher No. 30, $63,656.50, April, 1895;
Voucher No. 22, $19,860.08, May, 1895;

and those indicated and designated by the following vouchers (and

the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Apropriation for improving Jekyl creek, Georgia:'

Voucher No. 2, $3,309.40, June, 1893;
Voucher No. 2, $3,595.38, July, 1893;

and the one indicated and designated by the following voucher (and the entries therein and indorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving waterway between Savannah, Georgia, and Ferdinanda, Florida, applied to that work at Jekyl creek, Georgia:'

Voucher No. 1, $14,591.00, July, 1893;

and those indicated and designated by the following vouchers (and the entries therein and indorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia:'

Voucher No. 13, $874.73, December, 1894;
Voucher No. 42, $9,845.35, January, 1895;
Voucher No. 8, $17,800.50, February, 1895;

48 and those indicated and designated by the following vouchers (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving Cumberland sound, Georgia and Florida:'

Voucher No. 9, $21,287.65, March, 1895;
Voucher No. 29, $29,659.82, April, 1895;
Voucher No. 23, $32,059.92, May, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia:'

Voucher No. 16, $17,728.81, June, 1895;

and the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for improving harbor at Darien, Georgia. Improving Altahama river, Georgia. Improving waterway between Savannah, Georgia, and Ferdinanda, Florida. Improving Jekyl creek, Georgia:'

Voucher No. 14, $27,861.32, July, 1895;

the said Captain Carter causing each of the said payments to be made in or about the month named in the above description of the voucher relating to it, by drawing and delivering a check as such officer in charge of river and harbor improvements by which he ordered and directed that the amount indicated be paid out of the moneys of the United States then under his control as such officer."

To which charges and specifications the accused, Captain Oberlin M. Carter, corps of engineers, pleaded as follows:

Charge I.

To the first specification, in bar of trial, the statute of limitation (103d article of war), which plea was sustained by the court.

49 To the 2d specification, "Not guilty."

To the charge, "Not guilty."

Charge II.

To the 1st, 2d, 3d, 4th and 5th specifications, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.

To the 6th specification, "Not guilty."

To the 7th specification, "Not guilty."

To the 8th specification, "Not guilty."

To the 9th specification, "Not guilty."

To the 10th specification, "Not guilty."

To the charge, "Not guilty."

Charge III.

To the 1st specification, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.

To the 2d specification, "Not guilty."

To the 3d specification, "Not guilty."

To the 4th specification, "Not guilty."

To the 5th specification, "Not guilty."

To the 6th specification, "Not guilty."

To the 7th specification, "Not guilty."

To the 8th specification, "Not guilty."

To the 9th specification, "Not guilty."

To the 10th specification, "Not guilty."

To the 11th specification, "Not guilty."

To the 12th specification, "Not guilty."

To the 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st specifications, in bar of trial, the statute of limitation (103d article of war); which plea was sustained by the court.

To the 22d specification, "Not guilty."

To the 23d specification, "Not guilty."

To the charge, "Not guilty."

Charge IV.

To the 1st specification, "Not guilty."

To the 2d specification, in bar of trial, the statute of lim-

50 itation (103d article of war); which plea was sustained by the court.

To the charge, "Not guilty."

Finding.

And the court, after due deliberation, finds the accused, Captain Oberlin M. Carter, corps of engineers, as follows:

Charge I.

Of the 2d specification, "Guilty, except the words 'and other material' and interpolating the word 'and' between the words 'mattresses' and 'stone' wherever those words occur in the specification; of the excepted words not guilty and of the interpolated words guilty."

Of the charge, "Guilty."

Charge II.

Of the 6th specification, "Guilty, except of the words 'and other material' where they occur the second and third time and interpolating the word 'and' between the words 'mattresses' and 'stone' where they occur the second and third time; of the excepted words not guilty; of the interpolated word guilty."

Of the 7th specification, "Guilty."

Of the 8th specification, "Guilty."

Of the 9th specification, "Guilty."

Of the 10th specification, "Guilty."

Of the charge, "Guilty."

Charge III.

Of the 2d specification, "Guilty."

Of the 3d specification, "Guilty."

Of the 4th specification, "Guilty."

Of the 5th specification, "Guilty, except of the words 'the articles have been' and of the excepted words not guilty."

Of the 6th specification, "Guilty."

51 Of the 7th specification, "Guilty."

Of the 8th specification, "Not guilty."

Of the 9th specification, "Guilty."

Of the 10th specification, "Not guilty."

Of the 11th specification, "Guilty."

Of the 12th specification, "Not guilty."

Of the 22d specification, "Guilty."

Of the 23d specification, "Not guilty."

Of the charge, "Guilty."

Charge IV.

Of the 1st specification, "Guilty."

Of the charge, "Guilty."

Sentence.

And the court does therefore sentence the accused, Captain Oberlin M. Carter, corps of engineers, United States Army, "To be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name and place of abode of the accused to be published in

the newspapers in and about the station and in the State from which the accused came, or where he usually resides."

The record of the proceedings of the general court-martial in the foregoing case of Captain Oberlin M. Carter, corps of engineers, having been submitted to the President, the following are his orders thereon:

The findings of the court-martial in the matter of the foregoing proceedings against Captain Oberlin M. Carter, corps of engineers, U. S. Army, are hereby approved as to all except the following:

Charge 2. Specifications seven, eight, nine and ten.

Charge 3. Specifications three, four, five, six, seven, nine,
52 eleven and twenty-two, which are disapproved; and the sentence imposed by the court-martial upon the defendant, Oberlin M. Carter, is hereby approved.

ELIHU ROOT,
Secretary of War.

EXECUTIVE MANSION,
WASHINGTON, D. C., *September* 29, 1899.

Approved and confirmed.

WILLIAM McKINLEY.

By direction of the Secretary of War, Captain Oberlin M. Carter, corps of engineers, ceases to be an officer of the army from this date, and the United States penitentiary, Fort Leavenworth, Kansas, is designated as the place for his confinement, where he will be sent by the commanding general, department of the East, under proper guard.

By command of Major General Miles:

H. C. CORBIN,
Adjutant General.

(Official copy.)
H. C. CORBIN,
Adjutant General.

UNITED STATES OF AMERICA,
WAR DEPARTMENT,
WASHINGTON CITY, *October* 3, 1899.

Pursuant to section 882 of the Revised Statutes, I hereby certify that it appears from the records of the adjutant general's office, War Department, that the annexed copy of general orders No. 172, headquarters of the army, adjutant general's office, Washington, D. C., September 29, 1899, is a true copy of the original order on file in said office.

H. C. CORBIN,
Adjutant General, U. S. Army.

53 Be it known that H. C. Corbin, who signed the foregoing certificate, is the adjutant general of the army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand and caused the seal of the War Department to be affixed on this third day of October, one thousand eight hundred and ninety-nine.

ELIHU ROOT,
[SEAL.] *Secretary of War.*

(Endorsed:) U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

In the Matter of the Application of ABRAM J. ROSE for a Writ of *Habeas Corpus* for the Discharge of Oberlin M. Carter.

Now comes the petitioner for traverse to the return to the writ of *habeas corpus* made herein and says that said Carter has already suffered the punishment of dismissal from the army and the further punishment of publication of the crime and punishment as imposed by the sentence of the court-martial referred to in said return and denies that he is lawfully in the custody of the respondent under a lawful conviction and sentence of said court-martial as alleged in said return.

54 That the sentence of said court-martial as stated in said return was in excess of its powers and jurisdiction and said Carter is held by said respondent without authority of law.

Wherefore petitioner asks that he be discharged.

ABRAM J. ROSE, *Petitioner.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Abram J. Rose, being duly sworn, says: That he has read the foregoing return and that the same is true.

ABRAM J. ROSE.

Sworn to before me this 4th October, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

In the Matter of the Application of ABRAM J. ROSE for the Discharge of Oberlin M. Carter under a Writ of *Habeas Corpus.*

It is hereby stipulated and agreed, that on the 5th day of
55 October, 1899, the said Oberlin M. Carter, by Abram J. Rose, his attorney, tendered to the assistant treasurer of the United States, at the subtreasury in the city of New York, the sum of five thousand dollars in gold certificates, in payment of the fine for that amount imposed upon the said Carter by the sentence of the court-martial. That such assistant treasurer received the said five thousand dollars and gave a receipt therefor, a copy of which

is hereto annexed. That at the time of giving such receipt, it was stated to said Rose that the money would be placed in account 5, to the credit of the Secretary of the Treasury, and if such disposition was not satisfactory, said Rose would be notified. That no notice in that respect has been given said Rose.

It is further stipulated that on the 10th day of October, 1899, said Rose forwarded a duplicate of said receipt to the Secretary of War by registered letter, and that the same was received by him on or about the 11th day of October, 1899.

It is further stipulated that the facts set forth in the preceding stipulation may be taken, held and considered as part of the petition and return herein, so as to be a part of the record before the court for its consideration in the determination of the questions submitted to it.

New York, 16th October, 1899.

KELLOGG, ROSE & SMITH,
Att'ys for Petitioner.
HENRY L. BURNETT, *U. S. Att'y.*

No. 243.

OFFICE OF ASSISTANT TREASURER U. S.,
NEW YORK, *Oct.* 5. 1899.

I certify that Abram J. Rose, attorney for Oberlin M. Carter, this day deposited to the credit of the Secretary of the Treasury,
56 special deposit account No. 5, five thousand dollars, on account of description see back, for which I have signed triplicate receipts.

$5,000.

C. N. JORDAN,
Assistant Treasurer U. S.

(Indorsement on back:) "On account of payment of fine imposed on said Carter by sentence of general court-martial as approved by Secretary of War and the President. This deposit subject to approval of the Secretary of the Treasury."

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of Abram J. Rose for the discharge of Oberlin M. Carter, under a writ of *habeas corpus*. Stipulation as to payment of fine. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

In the Matter of a *Habeas Corpus* on the Relation of OBERLIN M. CARTER.

LACOMBE, *Circuit Judge:*

The sentence of the court-martial duly approved and confirmed, reads "to be dismissed from the service of the United States, to

suffer a fine of five thousand dollars, to be confined at hard
57 labor at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in and about the station, and in the State from which the accused came, or where he usually resides." The contention of the relator is that, conceding that the court-martial had jurisdiction of the person of the accused, and of the offenses charged, and conceding further the regularity of its proceedings and the propriety of its findings, it was without power to impose the four separate punishments of dismissal, fine, imprisonment, and degradation (special publication of sentence) although it might have imposed either one of them. When application was made for the writ it appeared that the first punishment, dismissal from the service of the United States, and the fourth publication of sentence, had been carried out; and the relator contended that having thus paid a penalty which the court had power to inflict, he could not be held to submit to another penalty which the court had no power to add to the one already by it selected. Since the return was made the relator has also paid the fine, and although that fact does not appear upon the face of the original papers, it has been discussed in the briefs of both sides and is now embodied in a stipulation, thus completing the case.

If the relator's premises be sound, viz., that punishments have been imposed in the aggregate, when the statute authorized their imposition only in the alternative his conclusion is supported by high authority, *Ex parte* Lang, 85 U. S., 163. In that case it was held that when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, and the judgment of the court thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end. The important question in the case, therefore, is
58 whether under the statutes of the United States the court-martial had the power, under its findings, to impose a sentence inflicting these four penalties.

The relator was tried upon four separate charges, namely:

I. Conspiring to defraud the United States, in violation of the 60th article of war.

II. Causing false and fraudulent claims to be made against the United States, in violation of the 60th article of war.

III. Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war.

IV. Embezzlement, as defined in section 5488, Revised Statutes of the United States, in violation of the 62d article of war.

He was found guilty of each of the four charges.

The 61st article of war provides that "any officer who shall be convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." This is a provision only independent of the other definitions of offenses in the statute; the same course of conduct may constitute an offense elsewhere provided for and also may warrant a finding of guilty under the 61st. The

100th article of war provides that "when an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers," &c. This is a specific statutory penalty which must inevitably follow the conviction, the court-martial being given no option as to its infliction. It is plainly additional to the punishment imposed for the "cowardice or fraud" *per se*. It is understood that the relator does not now contend that his dismissal and the publication of it is sufficient ground for his discharge. What the relator does contend is
59 that, having paid the fine he is entitled to invoke the principle established in the Lange case, on the theory that the court-martial had authority under the 60th article to impose only a fine or imprisonment, not to impose both. It is manifest that he is in no position to press this argument unless he can dispose of the conviction and sentence under the fourth charge. That charge is, "Embezzlement, as defined by sec. 5488 Revised Statutes of the United States, in violation of the 62d article of war."

The 62d article of war reads as follows:

"Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial according to the nature and degree of the offense, and punished at the discretion of such court."

The language, the general structure and the specific provisions of this article indicate that it is a catch-all clause intended to cover offenses not already specifically provided for. The framers of the article wisely foresaw that there might be many crimes, disorders and neglects, which could not be classified under any enumeration already contained in the articles, and which, if a court-martial were left without power to deal with them, might operate to the prejudice of good order and military discipline. Therefore, having "mentioned" various offenses which might be cognizable by a court-martial and punished as prescribed, the framers of the articles further provided that "all" offenses of certain specified characters, "though not mentioned" might also be taken cognizance of by a court-martial and punished at its discretion. It would seem to follow that where an offense is found to be specifically provided
60 for in any of the articles prior to the 62d, the grant of jurisdiction to try and punish such offense is conferred by the particular article which mentions it, and not by the general language of the 62d article. This proposition has commended itself to text-writers (Davis' Military Law, pp. 70, 71; Winthrop's Military Law, 2d edition, pp. 1126, 1127), and is in accord with general principles of statutory construction, U. S. *v.* Tynen, 11 Wall., 88; U. S. *v.* Auffmordt, 122 U. S., 197.

Section 5488 of the Revised Statutes reads as follows:

"SEC. 5488. Every disbursing officer of the United States who deposits any money intrusted to him in any place or in any man-

ner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law, transfers or applies any portion of the public money intrusted to him, is in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn transferred or applied; and shall be punished by imprisonment with hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment. (See sec. 3620, 5497.)"

The particular clause which is germane to the facts in the cause at bar, as appears from the findings of the court-martial, which sustain the fourth charge upon the first specification alone, is the one reading, "Every disbursing officer of the United States who * * * for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him is * * * deemed guilty of an embezzlement." Obviously this is a crime, made so by this very section, and, unless already mentioned
61 in the foregoing articles, would come within the provisions of the 62d. The 60th article reads as follows (the numbers of the paragraphs being inserted here for convenience of reference):

ARTICLE 60. Any person in the military service of the United States

1. Who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

2. Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

3. Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

4. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

5. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or any officer thereof, makes or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

6. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures
62 or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises

the use of, any such signature, knowing the same to be forged or counterfeited; or

7. Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any persons having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

8. Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

9. Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military service thereof; or

10. Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer or other person not having lawful right to sell or pledge the same.

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person being guilty of any of the offenses aforesaid,
63 while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

When the 9th subdivision of the 60th article is compared with the above-quoted subdivision of section 5488 it will be observed that, save in one particular, the former is broad enough to contain the latter. A person who "for any purpose not prescribed by law transfers or applies any portion of the public money entrusted to him" certainly "misappropriates" or "wrongfully disposes" of the same. But sec. 5488 covers such improper disposition of any public money, while the 9th subdivision of article 60 relates only to "money * * * of the United Staes furnished or intended for the military service thereof." It appears from the specification that the money was part of the sum appropriated by the act of June 3, 1896, chapter 314, 29 Stat. at Large, pages 202, 208, which is one of the usual "river and harbor" acts. It enacts that the sums thereby appropriated are to be expended "for the construction, repair and preservation of the public works hereinafter named." The public works enumerated are devised and carried out to facilitate commerce, not for military purposes, and the only argument that is advanced to sustain the proposition contended for is that the

Secretary of War is charged with the duty of making surveys of rivers and harbors, reporting as to what improvements therein shall best subserve the public interests and making contracts for the work, and that officers of the engineer corps are employed in taking charge of the execution of such contracts, and disbursing the money appropriated therefor. But although the trained skill of army officers is thus availed of to superintend the disbursement of money appropriated for the improvement of natural facilities for commercial intercourse, thus saving the expense of
64 engaging such skill elsewhere, it by no means follows that money so appropriated is "furnished or intended for the military service of the United States." The appropriation act for the fiscal year ending June 30, 1898—which contains a further appropriation for Savannah harbor—also contains under the heading "War Department" various items, to be expended under direction of the Secretary of War acting through officers of the army, and dealing with such public works as the care of the "Smithsonian grounds," the "laying asphalt walks around Judiciary square in the city of Washington," the "lighting of public grounds," and the "ordinary care of green-houses and nursery at the Executive Mansion." Surely these appropriations are not furnished or intended for "the military service," and appropriations for rivers and harbor improvements, are of the same class. It would seem to be a very strained construction of the act, which should hold that because the disbursing officer is himself in the military service of the United States, the money which he disburses must be held to have been "furnished or intended" for the military service, wholly irrespective of the purpose for which it is appropriated. It follows, therefore, that a court-martial would be without power to convict an officer of the army, under the 60th article, for knowingly or willfully misappropriating money of the United States, appropriated for—"furnished or intended for"—the improvement of rivers and harbors. Such an offense, however, falls clearly within the language of section 5488, and is therefore covered by the 62d article.

It must be held, therefore, that the court-martial, having found the relator guilty of the first specification under the fourth charge, and of that charge, has statutory authority under article 62 and section 5488, to impose a penalty of both fine and imprisonment. This conclusion leads to a dismissal of the writ. Counsel may attend at the opening of court on Monday at 10.30 a. m.,
65 when the order may be settled and signed, and in the event of an appeal being taken, the proper instructions upon remand, in conformity to the rules of the Supreme Court, may be given.

October 20th.

(Endorsed:) Circuit court of the United States for the southern district of New York. In the matter of a *habeas corpus* on the relation of Oberlin M. Carter. Opinion. Lacombe, C. J. U. S. circuit court. Filed Oct. 20, 1899. John A. Shields, clerk.

66 At a stated term of the United States circuit court for the southern district of New York, held in the U. S. court and P. O. building, in the city of New York, on the 23rd day of October, 1899.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of a *Habeas Corpus* on the Relation of OBERLIN M. CARTER.

A writ of *habeas corpus* having been allowed herein on the 2nd day of October, 1899, directed to General Wesley Merritt, U. S. Army, commanding the department of the East, and to Capt. Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, N. Y., commanding them to produce the body of the relator, Oberlin M. Carter, before this court; and returns having been duly made and filed to said writ, and the said relator having been produced in compliance with said writ; and after hearing Abram J. Rose, Esq., in favor of the said writ, and J. W. Clous, deputy judge advocate general, and Henry L. Burnett, U. S. attorney, and Ernest E Baldwin, assistant U. S. attorney, in opposition thereto, and due deliberation being had thereon, it is, on motion of Henry L. Burnett, U. S. attorney—

Ordered that the writ of *habeas corpus* herein be discharged; and it is further—

67 Ordered that the relator be remanded to the custody of General Wesley Merritt, U. S. Army, commanding the department of the East, and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus.

(A duplicate — the original being mislaid,' this order will be entered *nunc pro tunc* as of Oct. 23, 1899.)

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of a *habeas corpus* on the relation of Oberlin M. Carter. Order vacating writ. Henry L. Burnett, United States attorney. Filed Oct. 23, 1899.

68 United States Circuit Court for the Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus.*

And now comes the petitioner, by Kellogg, Rose & Smith, his attorneys, in connection with the petition of appeal from the order and judgment entered October 23, 1899, dismissing the writ of *habeas corpus* herein and directing that Oberlin M. Carter be returned to the custody from which he was taken for the purpose of suffering the punishment imposed by the sentence of a general court-martial, convened by the President of the United States, in pursuance of which general orders No. 172 of the headquarters of

the army were issued, and makes and files the following assignments of error:

The court erred in holding:

1st. That the said court-martial had jurisdiction to render the sentence imposed.

2nd. That the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the said sentence.

3rd. That the said Oberlin M. Carter was not restrained in his liberty without due process of law, as required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

69 4th. That said general orders No. 172, headquarters of the army, were sufficient and lawful authority for the imprisonment and detention of the said Oberlin M. Carter in custody.

5th. That charge IV of the charges and specifications charged an offense under the 62nd article of war, and did not charge an offense, if at all, under the 60th article of war.

6th. That said Oberlin M. Carter was amenable to further punishment under the sentence imposed by the court-martial after he had been dismissed from the military service, and the order of his dismissal personally served upon him.

7th. The court erred in dismissing the writ and remanding the prisoner for the reason that it clearly appears that the sentence of the court-martial to imprisonment was void and against the provisions of the Constitution, in that by the sentence of imprisonment the prisoner was punished twice for the same offense.

By reason whereof the petitioner prays that the said order directing that Oberlin M. Carter be remanded to the custody of Captain Benjamin K. Roberts, captain Fifth Artillery, at Fort Columbus, be reviewed, and that said Oberlin M. Carter be discharged from custody.

ABRAM J. ROSE, *Petitioner.*

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Assignment of errors. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. A copy of the within paper has been this day received at this office, Feb. 26, 1900. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Feb. 26, 1900. John A. Shields, clerk.

70 United States Circuit Court, Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus* for Oberlin M. Carter.

To the honorable the judges of the circuit court of the United States for the second circuit, in and for the southern district of New York:

The petition of Abram J. Rose respectfully shows:

First. That by virtue of general order No. 172, headquarters of the army, Adjutant General's Office, Oberlin M. Carter had been committed and is detained by virtue of a sentence imposed upon him by a general court martial convened by the President of the United States, which said sentence is as follows:

"And the court does therefore sentence the accused, Captain Oberlin M. Carter, corps of engineers, United States Army, to be dismissed from the service of the United States, to suffer a fine of five thousand dollars, to be confined at hard labor, at such place as the proper authority may direct, for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and the State from which the accused came or where he usually resides, and by virtue of said order No. 172 said Oberlin M. Carter was imprisoned and is restrained in his liberty, in the custody of
71 Captain Benjamin K. Roberts, in Castle William, Governor's island, in the southern district of New York, in the custody of Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York."

Second. That the cause or pretence of the imprisonment and restraint, according to the best knowledge and belief of the petitioner, is that charges and specifications were preferred against said Oberlin M. Carter, under the articles of war, as contained in the Revised Statutes of the United States, charging the accused with conspiracy in violation of the 60th article of war, and in presenting false claims in violation of said 60th article of war, and with embezzlement, as defined in section 5488 of the Revised Statutes of the United States, purporting to be in violation of the 62nd article of war, and with conduct unbecoming an officer and a gentleman in violation of the 61st article of war, in pursuance of which charges and specifications proceedings were had before the said general court-martial, convened as aforesaid, which terminated in the sentence above mentioned.

Third. That thereafter your petitioner applied for and obtained from this court a writ of *habeas corpus* for the discharge of the said Oberlin M. Carter on the ground that the court had no jurisdiction to render the sentence imposed and the imprisonment and detention of said Oberlin M. Carter was without authority of law and contrary to the provisions of the Constitution of the United States and was illegal.

That after the hearing by the court an order was entered herein

as of the 23rd day of October, 1899, dismissing the writ herein
72 and directing that said Oberlin M. Carter be remanded to the custody from which he was taken.

Wherefore your petitioner, feeling himself aggrieved by said order, appeals therefrom to the Supreme Court of the United States, and prays that this appeal may be allowed, and that a transcript of said order and the return of said Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York, to said writ and the traverse of this petitioner thereto may be transmitted to the said Supreme Court for review therein.

Dated New York, Feb'y 26th, 1900.

ABRAM J. ROSE, *Petitioner.*

KELLOGG, ROSE & SMITH,
Att'ys for Petitioner, 120 Broadway, N. Y.

Petition for apppeal allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Petition. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. A copy of the within paper has been this day received at this office. Feb. 26, 1900. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Feb. 26, 1900. John A. Shields, clerk.

73 United States Circuit Court, Southern District of New York.

In the Matter of the Petition of ABRAM J. ROSE for a Writ of *Habeas Corpus* for Oberlin M. Carter.

Know all men by these presents that we, Abram J. Rose, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this twenty-sixth day of February, one thousand nine hundred.

Whereas lately, at a circuit court of the United States for the southern district of New York, in a proceeding therein pending, an order was entered directing the return of Oberlin M. Carter to the custody of Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York, for the purpose of serving the sentence imposed by a general court-martial convened by the President of the United States, in pursuance of which general order No. 172 was issued for the punishment of said Oberlin M. Carter, as

directed by said sentence, and the said Abram J. Rose having obtained an appeal to the Supreme Court of the United States and filed copy thereof in the clerk's office of the said court to review said order:

Now, the condition of the above obligation is such that if the said Abram J. Rose shall prosecute said appeal to effect and shall answer all costs if he shall fail to make the said appeal good, then the above obligation to be void; else to remain in full force and effect.

ABRAM J. ROSE. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
[SEAL.] HENRY B. PLATT, *Vice-President.*

Attest: JOHN W. WOOTEN, *Attorney.*

Sealed and delivered and taken and acknowledged this 26th day of February, 1900.

ROBERT LAWRENCE,
[SEAL.] *Notary Public, New York County.*

STATE OF NEW YORK, }
County of New York, } ss:

On the twenty-sixth day of February, in the year 1899, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said that he was acquainted with John W. Wooten, and knew him to be the attorney of said company; that the signature of the said John W. Wooten, subscribed to the within instrument, was in the genuine handwriting of the said John W. Wooten, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Henry B. Platt.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company in the city of Baltimore, State of Maryland, on the first day of June, 1898, at which was present a quorum of said directors, duly authorized to act in the premises, on motion, it was unanimously—

"Resolved, That in pursuance of section eight hundred and eleven of the Code of Civil Proceedure of the State of New York, Henry B.

Platt, vice-president, or John W. Wooten, attorney, or Frank H. Platt, Theodore F. Wood, Edward T. Platt, Joseph A. Flynn and Hugh M. Allwood, attorneys-in-fact of this company in the State of New York, be, and each of them is, hereby authorized and empowered to sign, execute and deliver any and all bonds or undertakings for or on behalf of this company, and to attach thereto the seal of the corporation, the same to be attested by the said John W. Wooten, attorney of the company, or by either one of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, John W. Wooten, attorney of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and seal of the company, at the city of New York, this 26th day of February, 1900.

[SEAL.] JOHN W. WOOTEN, *Attorney.*

76 Fidelity and Deposit Company of Maryland.

Statement, December 30th, 1899.

Resources:		
Real estate	$600,000.00	
Stocks and bonds	1,539,977.00	
Railroad bonds	1,612,430.00	
Net premiums due	116,979.12	
Cash in bank, etc.	367,918.25	
		$4,237,304.37
Liabilities:		
Capital stock	$1,500,000.00	
Surplus and undivided profits	2,088,211.58	
Premium reserve	612,189.33	
Claims in process of adjustment	6,935.72	
Claims reported—proof not filed	29,967.74	
		$4,237,304.37

STATE OF NEW YORK, }
County of New York, } *ss:*

John W. Wooten, being duly sworn, says that he is the attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company as of December 30th, 1899, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JOHN W. WOOTEN.

Subscribed and sworn to before me this 26th day of Feb., 1900.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

77 (Endorsed:) U. S. circuit court, southern district of N. Y. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Bond. A copy of the within paper has been this day received at this office. Feb. 26, 1900. Henry L. Burnett, U. S. attorney. Approved Feb. 26, 1900. E. Henry Lacombe, U. S. C. J. U. S. circuit court. Filed Feb. 26, 1900. John A. Shields, clerk.

78 UNITED STATES OF AMERICA, *ss:*

To the United States of America and Captain Benjamin K. Roberts, captain Fifth artillery, commanding Fort Columbus, New York:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, on the 26th day of March, 1900, pursuant to an appeal on the part of Abram J. Rose filed in the clerk's office of the circuit court of the United States for the southern district of New York, in a certain suit or proceeding entitled "In the matter of the petition of Abram J. Rose for a writ of *habeas corpus*," to show cause, if any there be, why the decision of the United States circuit court in the said appeal mentioned should not be reversed, modified, or corrected and speedy justice should not be done in that behalf.

Given under my hand, at the city of New York, in the southern district of New York, on the 26th day of February, 1900.

E. HENRY LACOMBE,
Judge of the United States Circuit Court.

KELLOGG, ROSE & SMITH,
Att'ys for Appellant & Pl'ff in Error.

79 [Endorsed:] E. & A. B. 1755. U. S. circuit court, southern district of New York. In the matter of the petition of Abram J. Rose for a writ of *habeas corpus* for Oberlin M. Carter. Citation. Kellogg, Rose & Smith, att'ys for petitioner, 120 Broadway, New York. A copy of the within paper has been this day received at this office. Feb. 26, 1900. Henry L. Burnett, U. S. attorney, P. U. S. circuit court. Filed Feb. 26, 1900. John A. Shields, clerk.

Due and timely service of a copy of within citation is hereby admitted.

Dated New York, Feb'y 27, 1900.

____ ____,
U. S. District Attorney.

Endorsed on cover: File No., 17,684. S. New York C. C. U. S. Term No., 570. Oberlin M. Carter, on the petition of Abram J. Rose, appellant & plaintiff in error, *vs.* Captain Benjamin K. Roberts. Filed March 22nd, 1900.

In the

OBERLIN M. CARTER, Survivor, &c.,

Appellant and Plaintiff in Error,

against

BENJAMIN K. ROBERTS,

Respondent and Defendant in Error.

Brief for Appellant and Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

ABRAM J. ROSE,

Attorney and Counsel for the Appellant and Plaintiff in Error.

BENJAMIN F. TRACY,

Of Counsel.

HAMILTON PRINT, 12 SPRUCE STREET, N. Y. TELEPHONE, 2870 JOHN.

Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 570.

OBERLIN M. CARTER, on the Petition of ABRAM J. ROSE,

Plaintiff in Error,

against

BENJAMIN K. ROBERTS,

Defendant in Error.

Appeal from, and in error to, the Circuit Court of the United States for the Southern District of New York.

Brief for Appellant and Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

STATEMENT.

The charges and specifications preferred against Captain Carter, of which he was found guilty by Court-Martial, are as follows:

"CHARGE 1. CONSPIRING TO DEFRAUD THE UNITED STATES IN VIOLATION OF THE 60TH ARTICLE OF WAR."

"Specification II.—In that Captain O. M. Carter, Corps of Engineers, United States

Army, devising and intending to defraud the United States and to aid The Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money, by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims, hereinafter described; and in pursuance of the said conspiracy, the said O. M. Carter, in the months of June, July, August, September and October, 1896, being an officer of the United States, in local charge of the river and harbor district, usually called the Savannah District, and of the improvements by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvements in the Harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8th, 1896. And in further pursuance of the said conspiracy, the said The Atlantic Contracting Company, afterwards, to wit, from about the 8th day of October, 1896, to July 31st, 1897, did furnish and put into said work certain mattresses, stone and

other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone and other material contracted for; and did, on or about July 6th, 1897, cause to be paid out of the moneys of the United States $230,749.90 to the said The Atlantic Contracting Company, on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been. And in further pursuance of the said conspiracy, the said Captain Carter, about June, July, August, September and October, 1896, did advertise for proposals for a contract for improving Cumberland Sound, Georgia, in said river and harbor district, and did so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8th, 1896. And in further pursuance of the said conspiracy, the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain

mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States as and for the mattresses, stone and other material contracted for; and did, on or about July 6th, 1897, cause to be paid out of the moneys of the United States $345,000 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been. This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

CHARGE 2. "CAUSING FALSE AND FRAUDULENT CLAIMS TO BE MADE AGAINST THE UNITED STATES, IN VIOLATION OF THE 60TH ARTICLE OF WAR."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements, in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of The Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit, the claim represented in the following voucher submitted by the said Captain Carter, with his accounts, and

marked 'Appropriation for Improving Harbor at Savannah, Georgia.'

Voucher No. 8, $230,749.90, July, 1897,

and the claim represented by the following voucher, submitted by said Captain Carter, with his accounts, and marked 'Appropriation for Improving Cumberland Sound, Georgia and Florida.'

Voucher No. 9, $345,000, July, 1897,

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said The Atlantic Contracting Company, which had previously entered into contracts, dated October 8th, 1896, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone and other materials different from, inferior to, cheaper and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

CHARGE 3. "CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, IN VIOLATION OF THE 61ST ARTICLE OF WAR."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States

Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States, subject to his order and control as officer in charge of said improvements, to The Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said Company, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for Improving Harbor at Savannah, Georgia.'"

Voucher No. 8, $230,749.90, July, 1897.

"And the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for Improving Cumberland Sound, Georgia and Florida.'"

Voucher No. 9, $345,000, July, 1897.

"Each of the said payments having been caused to be made on or about July 6th, 1897, by the said Captain Carter drawing and delivering a check, as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

CHARGE 4 "EMBEZZLEMENT AS DEFINED IN SECTION 5488 REVISED STATUTES OF THE UNITED STATES, IN VIOLATION OF THE 62D ARTICLE OF WAR."

Specification I.— "In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and and harbor improvements in the Savannah river and harbor district, and as such officer in charge of said improvements, being a disbursing officer of the United States, and having intrusted to him large amounts of public money of the United States, did wilfully and knowingly apply, for purposes not authorized by law, large sums of the said money so intrusted to him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to anyone, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payment, being those designated by the following voucher (and the entries therein and the endorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for Improving Harbor at Savannah, Georgia.'"

Voucher No. 8, $230,749 90, July, 1897.

"And the one indicated and designated by the following voucher (and the entries therein and the endorsement thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for Improving Cumberland Sound, Georgia and Florida.'"

Voucher No. 9, $345,000, July 1897.

"Each of the said payments having been caused to be made on or about July 6th, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

See General Orders, Record, pp. 50–52.

The sentence of the Court-Martial was that the accused,

1st. Be dismissed from the military service.

2d. Pay a fine of $5,000.

3d. Be imprisoned at hard labor for a period of five years.

4th. Be degraded by publication of the crime, punishment, his name and place of abode in and about the station and the State from which he came or where he usually resides.

In pursuance of this sentence, the accused,

1st. Has been dismissed from the military service.

2d. Has paid the fine of $5,000.

3d. Is in actual confinement undergoing the imprisonment.

4th. Has been degraded by the publication of the crime.

Turning to the record, it will thus be seen that the accused is charged, first, with the crime of conspiracy to defraud the United States, and the payment of the two checks, one for $230,749.90, and

the other for $345,000, is set out and alleged as two of the overt acts necessary to consummate the crime of conspiracy under the statute. Then, as a separate and distinct offence, under article 60, the petitioner is charged with having caused to be made certain fraudulent claims against the United States, knowing the same to be fraudulent, the claim being represented by these same two checks. Then, under Article 61, he is charged with conduct unbecoming an officer and gentleman by wilfully and knowingly causing to be paid out of the moneys of the United States these same two checks. Then the payment of these same two checks is made again to do duty in the charges and specifications, as an embezzlement of the moneys of the United States by a military officer.

It thus appears that payment of these two checks is made the basis of four distinct and separate offences, and the defendant is convicted of the crime of conspiracy on proof of the payment of these checks, he is convicted of the crime of presenting false and fraudulent claims upon the proof of the payment of these two checks, of conduct unbecoming an officer and gentleman, based upon proof of the payment of these two checks, of embezzlement, based solely upon proof of the payment of these two checks.

The constitutional question sought to be raised and discussed, and to have decided in this case is, whether a man can be, under the military law, four times convicted and punished for the same identical act, and whether a soldier, in time of peace, can invoke the protection of this clause of the Constitution.

The gravity of this question, which we seek here to present, becomes apparent when we refer to a decision, cited by the learned Attorney-General in his brief, delivered by Judge Wallace, who is there quoted as asserting that it is within the power of Congress to declare that the same act shall constitute two separate and distinct criminal

offences for which a soldier may be convicted and punished.

> "It is also proper to state that Congress "can, if it sees fit, carve out two or more "offences from a single criminal transaction, "and impose cumulative punishment for the "different offences (Commonwealth *v.* "Trickey, 95 Mass., 559; United States *v.* "Harmison, 3 Sawyer 556), and if the Court-"Martial convicted the relator of several "offences for a single criminal transaction, it "did not transcend necessarily the power "conferred by the Sixtieth Article of War."
>
> Opinion Wallace, J., Respondent's Brief, p. 19.

It is difficult to conceive of a more important constitutional question than is thus presented in this case. We submit that it is no more within the power of Congress to subject the soldier to be put twice in jeopardy for the same act than a civilian. The same constitutional immunity extends to both citizen and soldier. It is the fundamental right that he possesses as a citizen, and he does not cease to be a citizen when he becomes a soldier.

A writ of habeas corpus was granted by the Circuit Court for the Southern District of New York, which writ was subsequently dismissed, and the prisoner remanded to the custody from which he was produced, in conformity to Rule 34.

Among others, the following assignments of error were filed by the petitioner:

That the Court erred in holding,

(*a*). That the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the said sentence.

(*b*). That the said Oberlin M. Carter was not restrained in his liberty without due process of law as

required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

The petitioner claims that his case is properly in this Court on the ground that it appears upon the face of the record that he has been twice punished for the same offence, and that the second punishment is one inflicted without authority of law and violative of the rights secured to every citizen by the Constitution, that no person shall be twice punished for the same offence.

If it be true that the petitioner is now undergoing a punishment inflicted without authority of law, his right to be discharged upon habeas corpus is established by repeated decisions of this Court.

This proposition we do not understand to be disputed by the brief of the learned Attorney-General; but it is contended that the fact that he is thus being punished without authority of law is not made to appear upon this record, and, therefore, the question cannot be considered by this Court. This, we submit, is a mistake.

Referring to the petition (par. 7, p. 3, fol. 5, of the Record) and to the assignment of errors (p. 42, assignments Nos. 3 and 7, fols. 68 and 69), it will be seen that the fact that the detention of Carter is not authorized by law, and is in violation of the Constitution, is clearly and plainly stated, and is a violation of that provision of the Constitution which is clearly and positively stated.

Even if the petition fails to state in detail all the facts from which it appears that the prisoner is suffering a double punishment for the same offence, any defect in the petition in this respect is supplied by the return to the writ of habeas corpus, in which the whole record of the charges, specifications and sentence is set out. It is wholly immaterial whether a fact necessary to sustain the legal conclusions set out in the petition, that the defendant is being illegally imprisoned, appears in the petition or in the

return. If it appears upon the record and is covered by an assignment of error, then the question is properly before this Court.

This is the rule to be deduced from the authorities cited by the learned Attorney-General.

In Cornell *v.* Greene, 163 U. S., 79, the first case cited by the Attorney-General, it is distinctly stated that when a right, privilege or immunity is claimed under the Constitution, it is sufficient, if a definite issue in respect to the possession of that right, is distinctly deducible from the record. From this record, the right and power of the Court to inflict both fine and imprisonment for the offence charged under the Sixtieth Article of War is directly and necessarily drawn in question.

Argument.

I.

The record expressly shows that this case comes under the provisions of Section 5 of the Act of Congress of March 3d, 1891, and that a question involving the application of the Constitution was directly raised in the court below.

(*a*). The Act of March 3d, 1891, establishing the Circuit Court of Appeals provides as follows:

> "Sec. 5. That appeals or writs of error "may be taken from the District Courts, or "from the existing Circuit Courts direct "to the Supreme Court in the following "cases:
>
> "In any case in which the jurisdiction of "the court is in issue; in such cases the

"question of jurisdiction alone shall be cer-
"tified to the Supreme Court from the court
"below for decision. From the final sen-
"tences and decrees in prize causes. In
"cases of conviction of a capital or otherwise
"infamous crime. In any case that involves
"the construction or application of the Con-
"stitution of the United States. In any
"case in which the constitutionality of any
"law of the United States, or the validity or
"construction of any treaty made under its
"authority is drawn in question. In any
"case in which the Constitution or law of a
"State is claimed to be in contravention of
"the Constitution of the United States.

"Nothing in this act shall affect the juris-
"diction of the Supreme Court in cases ap-
"pealed from the highest court of a State,
"nor the construction of the statute pro-
"viding for review of such cases."

Act of March 3d, 1891, (26 Stat., 826.)

(*b*). In the Circuit Court it was claimed that the accused had been twice punished for the same offence, because Charges I, II and IV covering conspiracy, presenting false claims, and embezzlement, respectively, were punishable ONLY under the 60th Article of War, which prescribes punishment in the alternative by fine *or* imprisonment, and not cumulative punishment by fine *and* imprisonment; that Article 61, under which Charge III, "conduct unbecoming an officer and a gentleman" was laid prescribes punishment by dismissal from the service; and that the 100th Article of War provides for degradation by the publication of the crime, in cases where the accused was found guilty of fraud.

That, therefore, by none of the Articles, under which the offence was properly chargeable, was cumulative punishment by fine *and* imprisonment authorized.

The 62d Article of War, under which Charge IV, embezzlement, was laid, provides for punishment at the discretion of the Court. Under this sweeping provision, if the accused was found guilty of an offence properly chargeable thereunder, the sentence imposed might be justified, as it was broad enough to allow any punishment which the Court-Martial might see fit to inflict.

It was, therefore, contended on behalf of the appellant that although Charge IV was laid under the 62d Article of War, it was not properly chargeable thereunder, but only under the 60th Article of War, which authorizes punishment for a single offence by fine *or* imprisonment, but not by both.

The opinion written by Judge Lacombe of the Circuit Court clearly shows that double punishment for the same offence was the question directly at issue and before him for decision. He states:

> "The contention of the relator is that, "conceding that the Court-Martial had juris- "diction of the person of the accused and of "the offences charged, and conceding fur- "ther the regularity of its proceedings and "the propriety of its findings, it was with- "out power *to impose the four separate pun- "ishments of dismissal, fine, imprisonment "and degradation (special publication of "sentence), although it might have imposed "either one of them.* * * *
>
> "If the relator's premises be sound, viz., "that punishments have been imposed in "the aggregate when the statute authorized "their imposition only in the alternative, his "conclusion is supported by high authority "(*ex parte* Lange, 85 U. S., 163). In that "case it was held that when a Court has im- "posed fine and imprisonment where the "statute only conferred power to impose by "fine or imprisonment, and the fine has "been paid and the judgment of the Circuit "Court thus executed so as to be a full sat

"isfaction of one of the alternative penalties
"of the law, the power of the Court as to
"that offence is at an end.

"The important question in the case,
"therefore, is whether, under the statutes
"of the United States, the Court-Martial had
"the power under its findings to impose a
"sentence including these four penalties."

See Opinion Lacombe, Circuit Judge,
page 36, folios 57-58.

It is true the argument was based upon the provisions of the Articles of War, and in that sense the construction of the statute was in question.

Whether the sentence was imposed under a statute which authorized the punishment prescribed, or under an erroneous construction of that statute, is immaterial; because, if the effect of the sentence is to twice punish for the same offence, to quote Mr. Justice Bradley, "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law."

Ex parte Neilsen, 131 U. S., 176.

Conceding, then, that the contention of the appellant was based upon a construction of the Articles of War, the *point* in the argument was that the constitutional provisions against a double punishment for the same offence had been violated in this case, because all of the inter-included charges were based upon a single alleged criminal transaction, and that, in order to justify the sentence, at least one presentation of the offence must have been properly punishable under a statute broad enough to justify the sentence imposed; that the 62d Article of War was the only one which would have justified the sentence, but

that none of the charges was properly laid under that Article, because the presentation of the offence as charged under Charges I, II, and IV were specifically provided for under the 60th Article of War, and the presentation of the offence charged under Charge III was specifically provided for under the 61st Article of War; that the 62d Article of War was a "catch-all" clause granting jurisdiction to try and punish *only* for offences not properly chargeable under the other articles. This has been the contention of the appellant from the start, and the one which was urged at the Circuit Court and the Circuit Court of Appeals.

Besides, the Assignments of Error filed put at rest any doubt as to the provisions of the Constitution having been invoked in this case.

Error was assigned on the specific ground that the Court erred in holding that the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the sentence of the Court-Martial, and that he was not so detained contrary to the provisions of the Constitution and of the laws of the United States.

See Assignments of Error, page 42, folio 68.

If the appellant's contention (that the offences with which the accused was charged are based upon a single criminal transaction) be correct, it necessarily follows that the provisions of the Constitution have been violated by the sentence in this case.

That the Court will upon habeas corpus inquire whether the accused has been twice punished for the same offence, and, if so, discharge the prisoner, is fully supported by the decisions of this Court.

Ex parte Neilsen, 131 U. S., 176.
Ex parte Snow, 130 U. S., 274.
Coffey *v.* U. S., 116 U. S., 436.
U. S. *v.* Chouteau, 102 U. S., 603.
Ex parte Lange, 85 U. S., 163.

The record in this case then clearly discloses that the provisions of the Constitution were directly invoked in the Circuit Court, and that the application of those provisions to this case was the question directly in issue.

II.

The accused in no way waived his right of review by this Court by the appeal to the Circuit Court of Appeals.

There is nothing in the record before this Court on this motion to show that this case was ever before the Circuit Court of Appeals.

If, however, this Court shall consider that the effect of an appeal to that Court in this case is properly before them, then we respectfully submit, no waiver of the right to review by this Court can be predicated on the hearing and determination by the Circuit Court of Appeals.

(*a*). In the case of Pullman Palace Car Company against Central Transportation Company (171 U. S., 138) this Court expressly held that the right to appeal directly to this Court from the Circuit Court because of a constitutional question is not waived by taking an appeal also to the Circuit Court of Appeals.

Mr. Justice Peckham, speaking for this Court, said:

> "Counsel for the Pullman Company took
> "the appeal directly from the Circuit Court
> "to this Court on the theory that the case
> "involved the construction or application of
> "the Constitution of the United States, be-
> "cause of the holding of the Court below

> " that the cause of action alleged by the
> " Central Company in its cross bill was, un-
> " der the circumstances, a proper subject of
> " equitable cognizance, and counsel claimed
> " it was really nothing but a legal cause of
> " action, in regard to which the cross defend-
> " ant was entitled to a trial by jury under
> " the Constitution of the United States.
> " There being room for doubt in regard to
> " the soundness of such contention, the
> " counsel also took an appeal to the Circuit
> " Court of Appeals, *and we think that by this*
> " *action he did not waive any right of ap-*
> " *peal which he would otherwise have had.*
> " Whichever route may be the correct one,
> " either directly from the Circuit Court or
> " through the Circuit Court of Appeals, it is
> " unnecessary to decide, because the case is
> " now properly before us either by appeal or
> " by the writ of certiorari; and we, there-
> " fore, proceed to determine it upon the
> " merits."
>
> Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S., 138.

In that case, it is true, there was no decision upon the merits by the Circuit Court of Appeals. Nor was there any decision as to the application of the Constitution by the Circuit Court of Appeals in the case at bar.

The learned Judge of that Court writing the opinion seems to have based it upon the following grounds:

1st. That upon habeas corpus the Court cannot look into the record for the purpose of ascertaining whether two or more alleged offences were, in fact, but one and the same criminal act.

2d. That as two of the charges, namely, conspiracy and presenting false claims, were properly

chargeable under the 60th Article of War, which allows punishment by fine or imprisonment for each offence therein enumerated, the punishment in this case by fine and imprisonment was authorized, because the accused had been found guilty of, at least, two of the offences therein enumerated.

It will thus be seen that the Circuit Court of Appeals did not pass upon either one of the two following questions:

1st. That the four different presentations of the offence charged were based upon and included under one and the same criminal act.

2d. That the offence of embezzlement under Charge IV was not properly laid under the 62d Article of War, but should have been laid under the 60th Article of War.

Judge Wallace distinctly says, in his opinion, that neither one of those questions was considered:

> " Whether the specifications support the
> " charges or the evidence supports the speci-
> " fications we are not at liberty to consider.
> " *Nor is it open to inquiry whether the two*
> " *offences were, in fact, but one and the same*
> " *criminal act.*" * * * " In dismissing the
> " writ, the Court below expressed the opinion
> " that the relator was properly convicted by
> " the Court-Martial of an offence in violation
> " of the 62d Article of War, and that the
> " sentence of imprisonment was supported
> " by such conviction. Without intending to
> " impugn the correctness of this conclusion
> " *we have not considered the question* be-
> " cause, in the view we have reached, it does
> " not arise."

See Opinion Wallace, J., pages 18-20, Respondent's Brief.

The principal questions in this case, viz., that the four charges were based upon and included under one and the same criminal act, and that there was no statute under which any one of the presentations of the offence was properly chargeable, which authorized the sentence inflicted, were thus not passed upon, but on the contrary, were entirely ignored by the Circuit Court of Appeals, and its decision, placed upon entirely different and minor grounds, must of necessity fall if the controlling constitutional point be well taken.

(*b*). The decision of this Court in Robinson *v.* Caldwell (165 U. S., 359) is clearly distinguishable from the case at bar.

In that case, while it appears from a report of the decision, that the constitutionality of the act of Congress of March 3d, 1873, was drawn in question, and that also the construction of a treaty made between the government and the Nez Percé Indians was involved, the question presented to this Court upon the appeal, *was simply as to the jurisdiction of the Circuit Court*, the contention being that the plaintiff could not have brought an original suit in the Circuit Court of the United States, and, therefore, that the case was not removable from the State Court where it was originally commenced.

In that case, too, the Circuit Court of Appeals directly passed upon the constitutionality of the act in question, as well as the construction of the treaty involved.

This Court said that as the whole case, *on its merits*, had been determined by the Circuit Court of Appeals, the appeal to this Court direct from the Circuit Court *on the ground that the jurisdiction of the Circuit Court was in question*, could not be maintained.

The question of jurisdiction, on removal from a State Court, may very properly be considered as collateral to the controversy involved in the action itself, and that by submitting to the jurisdiction of

the Circuit Court and to the Circuit Court of Appeals, the defendant waived his right to raise the question of jurisdiction.

It was not decided in the Robinson case that the appeal could not have been maintained if the question presented to this Court was the constitutionality of the act of Congress or the question of the treaty involved.

In the case at bar the application of the Constitution is the question directly presented upon this appeal, and that question has not been determined or passed upon by the Circuit Court of Appeals, but, on the contrary, was not even examined by the Court, although raised and argued in that Court.

Nor does the case of Columbus Construction Company *v.* Crane Company (174 U. S., 600) in any way preclude the maintenance of this appeal.

In that case the appeal was taken to this Court while the case was still pending before the Circuit Court of Appeals, and this Court said that it was not in accordance with orderly practice that separate appeals or writs of error on the merits in the same case should be pending at the same time in two appellate courts.

> Columbus Construction Co. *v.* Crane Construction Co. (*supra*).

In the case at bar, the appeal and writ of error in the Circuit Court of Appeals has been finally disposed of.

This case, it is therefore respectfully submitted, comes directly under the decision of this Court in the Pullman Palace Car Company case (*supra*), and is clearly distinguishable from the two cases last above referred to.

(*c*). The motion to dismiss the appeal should, therefore, be denied.

1st. Because this case is directly within the provisions of Section 5 of the Act of March 3d, 1891,

allowing an appeal direct to this Court in a case where the application of the Constitution of the United States has been invoked.

2d. Because, by the record, it clearly appears that the application of the Constitution was the question at issue before the Circuit Court.

3d. Because even if a determination of the *whole case upon the merits* by the Circuit Court of Appeals be held to be a waiver of the right to appeal to this Court, that rule has no application to the case at bar, because the Circuit Court of Appeals did not determine the controlling constitutional question, but, on the contrary, affirmed the order appealed from without examining or passing upon the question of the application of the Constitution.

III.

If this Court shall hold that it has jurisdiction of the appeal, it is submitted, a full argument of the questions involved should be granted for the reasons stated in the briefs submitted on the behalf of the appellant, on the motion for a writ of certiorari from this Court to the Circuit Court of Appeals.

ABRAM J. ROSE,
Attorney and Counsel for the Appellant and Plaintiff in Error,
120 Broadway,
New York City.

BENJAMIN F. TRACY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

OBERLIN M. CARTER, ON THE PETITION of Abram J. Rose, appellant and plaintiff in error,
v.
BENJAMIN K. ROBERTS.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

STATEMENT.

The appellant and plaintiff in error was, prior to the 29th day of September, 1899, a captain of the United States Army, assigned to the Corps of Engineers. He was arraigned and tried before a court-martial in Savannah, Ga., convened according to law, upon the following charges, viz:

CHARGE I. Conspiracy to defraud the United States, in violation of the Sixtieth Article of War (being article

60, under section 1342, Revised Statutes), and upon which there was a finding of guilty to the general charge, and also with certain amendments to the second specification thereof.

CHARGE II. For causing false and fraudulent claims to be made against the United States, in violation of the said Sixtieth Article of War, upon which there was a finding of guilty upon the general charge, and also upon the second specification thereof, with certain modifications and amendments.

CHARGE III. Of conduct unbecoming an officer and gentleman, in violation of the Sixty-first Article of War, upon which said charge there was a finding of guilty upon the general charge, and also upon ten specifications thereunder.

CHARGE IV. For embezzling, as defined in section 5488, Revised Statutes, in violation of the Sixty-second Article of War, and upon which said charge there was a finding of guilty upon the general charge, and also upon the first specification thereof.

The court-martial thereupon imposed the following sentence:

> And the court does therefore sentence the accused, Capt. Oberlin M. Carter, Corps of Engineers, U. S. A., to be dismissed from the service of the United States, to suffer a fine of $5,000, to be confined at hard labor at such place as the proper authority may direct for five years, and the crime, punishment, name, and place of abode of the accused to be published in the newspapers in and about the station and in the State from which the accused came, or where he resides.

The sentence was thereupon approved by the Secretary of War and confirmed by the President of the United States, on the 29th day of September, 1899, and the Secretary of War, upon whom devolved the necessary action for the execution of the said sentence, then declared that upon the date mentioned the appellant and plaintiff in error ceased to be an officer of the Army, and the United States penitentiary at Fort Leavenworth, Kans., was designated as the place of his confinement, where he was ordered to be sent, by the commanding general Department of the East, under guard.

Thereafter, on the 2d day of October, 1899, the appellant and plaintiff in error obtained from the circuit court of the United States for the southern district of New York a writ of habeas corpus commanding Gen. Wesley Merritt, the appellee and defendant in error herein, to have the body of the said Carter, together with the time and cause of his imprisonment and detention, before the said court on the 4th day of October, 1899. Upon the return of said writ the body of the appellant and plaintiff in error was produced before said court, and return made showing that the said appellant and plaintiff in error was detained in custody by authority of General Orders, No. 172, of September 29, 1899, being the order hereinbefore set forth, by authority of which said general order the appellee and defendant in error made return that the said appellant and plaintiff in error was not unlawfully detained, and prayed for dismissal of the writ. During the pendency of said habeas corpus proceeding before the said circuit court the appellant and plaintiff in error herein paid a fine provided for in said sentence.

Thereupon the circuit court dismissed the said writ and the appellant and plaintiff in error was remanded to the custody from which he was produced in conformity to Rule 34.

Thereafter an appeal was filed and a writ of error was granted and issued out of the United States circuit court of appeals for the second circuit, and the said circuit court for the southern district of New York, and the record and proceedings of said cause and all things concerning the same were sent to the said circuit court of appeals on the 20th day of November, 1899, and the said record and all proceedings thereunder and all things touching the same were duly certified to the said circuit court of appeals as aforesaid.

The said case on appeal came on to be heard in the United States circuit court of appeals on the 9th day of January, before Judges Wallace and Shipman, and on the 24th day of said month said court rendered a decision affirming the judgment of the circuit court below, with costs.

Thereafter, on February 5, 1900, a petition for a writ of certiorari in the cause to the circuit court of appeals was submitted to this court, which, on February 26, 1900, was denied. On the same day, February 26, this appeal was taken and writ of error sued out to review the order of the circuit court dismissing the writ of habeas corpus and remanding said Carter to the custody from which he was taken.

ARGUMENT.

I.

Error is not the proper remedy, and the writ should be dismissed. In re Neagle, 135 U. S., 1, 42; In re Morrissey, 138 U. S., 158.

II.

To entitle the appellant to take the appeal from the circuit court direct to this court, it must appear that the case comes under one or more of the provisions of section 5 of the act of Congress of March 3, 1891 (26 Stats., 826). This section reads as follows:

> That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court below for decision.
>
> From the final sentences and decrees in prize cases.
>
> Any cases of conviction of capital * * * crime.
>
> In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States, or the validity or the construction of any treaty made under its authority, is drawn in question.
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.
>
> Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the

highest court of the State, nor the construction of the statute providing for review of such cases.

An examination of the assignments of error set out in this case for the purpose of ascertaining under which of the foregoing provisions the appeal might possibly be brought, and which must have been in the mind of the judge when he allowed the appeal and writ of error, shows that it is evidently the fourth subdivision of that section which is meant. This reads: "In any case that involves the construction or application of the Constitution of the United States." Certainly no other of the provisions of that section has the remotest relation to this case.

In order to give the Supreme Court appellate jurisdiction under the section of the act of March 3, 1891, above quoted, upon the ground that this case "involves the construction or application of the Constitution of the United States," a construction or application of the Constitution must have been expressed or requested in the circuit court below. This point was directly in issue in a case decided by the Supreme Court, in which the same clause of the act of Congress was construed.

In *Cornell* v. *Green* (163 U. S., 79) the court said:

> A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law

> of the United States is drawn in question—not incidentally, but necessarily and directly—that our jurisdiction can be invoked for that reason. An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891. (*Ansbro* v. *United States*, 159 U. S., 695, 697, 698.)

See also *Muse* v. *Arlington Hotel Co.* (168 U. S., 435); *Carey* v. *Houston and Texas Central Railway* (150 U. S., 170, 181).

Examining the record in this case, there is no indication of anything like an intention on the part of the appellant to invoke the protection of the Constitution of the United States, except in the suggestion or legal conclusion in the seventh point of his petition for the writ of habeas corpus, which point reads as follows:

> That having suffered the punishment of dismissal and the degradation of the publication of the crime and punishment as imposed by said sentence, the imprisonment and detention of said Oberlin M. Carter is without authority of law, and the further punishment and detention of said Oberlin M. Carter and the carrying out of said sentence is contrary to law and the provisions of the Constitution of the United States, and is illegal.

There is no definite issue made here, no question raised, nor any statement made as to what particular provision of the Constitution was applicable or had been violated, and no definite ruling asked on any particular constitutional point; and no such point was decided or

touched upon by Judge Lacombe in his opinion when dismissing the writ of habeas corpus.

The statement of the appellant that the carrying out of the sentence is contrary to the provisions of the Constitution is an averment of a mere conclusion of law, and not a matter of fact, and there is nothing in the whole record from which a definite issue in respect to a constitutional question could be directly and distinctly deduced.

Taking into consideration the seventh point in the petition for a writ of habeas corpus, in connection with the whole circumstances and conditions surrounding this case, we fail upon the closest examination to discover what particular provision of the Constitution can legally be considered as having been involved in this case or claimed to be applicable. The appellant, however, in the third point of his assignment of errors, claims that the court erred in holding:

> That the said Oberlin M. Carter was not restrained in his liberty without due process of law, as required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

The seventh point of the same assignment of errors is on the same lines.

But these are mere assertions in which there is no merit, for the fifth amendment to the Constitution, in which the provision is found that "No person shall be deprived of * * * liberty * * * without due process of law," is a restriction upon the courts of the United States, but courts-martial are no part of the ju-

diciary of the United States, but simply an instrumentality of the Executive, and neither the fifth nor any other amendment of the Constitution affects the government of the land and naval forces.

Ex parte Milligan, 4 Wall., 123, 136, 137.
In re Bogart, 2 Saw., 407.

A trial by court-martial, therefore, while due process respecting those to whom it is applicable, is not that due process of law which the fifth amendment secures to every citizen in cases not arising in the land and naval forces.

While it is denied that any construction or application of the Constitution is presented in the record in this case, or that any provision of the Constitution could legally have arisen under the facts in this case, it is conceded that the military tribunals must keep within the limits of their legal authority, which, if it has been overstepped in the matter alleged in this case, is a question of the construction of the Statutes involved and not one presenting a case involving either the construction or application of the Constitution.

The whole case shows that it originally came before the circuit court of the United States, under section 752, Revised Statutes, upon the allegation that the appellant was restrained of his liberty in violation of the laws of the United States, and it was discussed before, presented to, and disposed of by the circuit judge upon the same lines, and not upon any constitutional questions.

III.

It is further maintained that even if the record exhibited a case coming under section 5 of the act of

March 3, 1891, the appellant has no right to have this case finally determined by the Supreme Court, because he heretofore elected to take his case to the circuit court of appeals by writ of error, under section 6 of the act cited, instead of taking it direct from the circuit court to the Supreme Court under an appropriate clause of section 5, if the same could be done.

This doctrine was held in the case of *Robinson* v. *Caldwell* (165 U. S., 359). That case was heard in the circuit court of the United States for the district of Idaho upon its merits, and judgment rendered for the plaintiff, and included the consideration of questions involving the construction of a treaty and the validity of an act of Congress. The defendant in the case was allowed an appeal direct to the Supreme Court. Pending this appeal, the defendant also prosecuted an appeal in the same case before the circuit court of appeals, which determined the case in favor of the plaintiff. This court also considered all the questions involving the construction of the treaty and the validity of the act of Congress. When subsequently the original appeal was heard by the Supreme Court, it was dismissed, the court holding that under the circumstances stated it could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari. The opinion of the court is in part as follows:

> As the construction of a treaty made under the authority of the United States and the constitutionality of an act of Congress were drawn in question in the circuit court, this court could have taken cognizance of the case upon the appeal from the circuit

court, and determined upon those questions, and having thus acquired jurisdiction of the cause, it could have determined any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not. (26 Stat., 826, c. 517, par. 5.) But the defendant elected to prosecute also an appeal to the circuit court of appeals, and that court considered and determined the whole case upon its merits.

It was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals. As no question of jurisdiction was certified by the circuit court, and as the defendant chose not to wait the action of this court upon the appeal to it from the circuit court, but invoked the jurisdiction of the circuit court of appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the circuit court.

We are of opinion that the present appeal must be dismissed. After the final decree upon the merits in the circuit court of appeals, this court, under the circumstances stated, could properly take cognizance of the case, in respect of any question involved in it, only upon certiorari.

See also, May U. S. Supreme Court Practice, p. 465.
McLish v. *Roff*, 141 U. S., 661, 668.
United States v. *John*, 155 U. S., 109.
Chappell v. *United States*, 160 U. S., 499, 509.

The only differences between the case at bar and the facts in the case of *Robinson* v. *Caldwell* are, that the Supreme Court was appealed to in the latter case before appeal was made to the circuit court of appeals, while in the case at bar a writ of error is taken to the Supreme

Court subsequent to a final determination of the case by the circuit court of appeals against the appellant, and subsequent to a denial by the Supreme Court of his petition for a writ of certiorari.

The rule laid down in *Robinson* v. *Caldwell* has not been modified by the decision of this court in the case of *Pullman's Car Company* v. *Transportation Company* (171 U. S., 138). In that case an appeal from the judgment of the circuit court, based upon a constitutional ground, was taken direct to this court. There being doubt as to the jurisdiction of the Supreme Court, an appeal was also taken to the circuit court of appeals. Application was then made to this court for a writ of certiorari, directed to the circuit court of appeals, which was granted; so that the case was properly before this court, if not on appeal, then by certiorari.

It is to be observed from the language of the Supreme Court in the case of *United States* v. *John* and *Robinson* v. *Caldwell*, that the circuit court of appeals is not barred to hear and decide any of the questions arising in any cases involving the matter of jurisdiction, or the validity of a statute of the United States, or the construction or validity of a treaty, subjects specifically mentioned in section 5 of the act of March 3, 1891. Indeed, in the case of *United States* v. *John*, the court distinctly held that if any such questions are decided, a review of them by the Supreme Court could, when necessary, be obtained by certiorari.

It must not be forgotten that in addition to the remedy pursued in the circuit court of appeals, the appellant has also petitioned the Supreme Court for a writ of certiorari.

in which he set forth all the assignments of error now contained in the writ of error allowed by Judge Lacombe on February 26, 1900.

This petition was denied by the Supreme Court on the date just mentioned, subsequent to which the new proceedings were instituted looking to a hearing of the whole case before the Supreme Court of the United States upon writ of error and appeal, ignoring totally in these proceedings the fact that the case had been decided by the circuit court of appeals and had been before the Supreme Court upon the petition for a writ of certiorari.

From what has been said, it is submitted that sufficient grounds exist for a motion to dismiss the appeal and writ of error upon the grounds—

First, that the Supreme Court has no jurisdiction, in that the record does not disclose any case covered by section 5 of the act of March 3, 1891;

Second, that even if the record discloses a case coming under the section just stated, the appellant having elected to take his case to the circuit court of appeals, is barred from taking an appeal under the section quoted because it is not the purpose of the judiciary act of 1891 to give a party who is defeated in the circuit court of the United States, the right to have his case finally determined upon its merits both in the Supreme Court and in the circuit court of appeals.

Third, that the questions sought to be reviewed by the Supreme Court in the present appeal and writ of error have been submitted to it in the petition for a writ of certiorari, which petition was denied.

Fourth, that the record not showing any case arising under section 5, and the appeal having been taken to the circuit court of appeals under section 6 of the judiciary act of 1891, the judgment of the circuit court of appeals in this case is final and conclusive.

IV.

If, however, the court shall hold that it has jurisdiction of the appeal, it is submitted that the order appealed from should be affirmed, for the reasons stated in the opinion of the circuit court of appeals for the second circuit, printed in the appendix hereto.

J. K. RICHARDS,
Solicitor-General.

HENRY L. BURNETT,
United States Attorney.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

ROSE EX REL. CARTER, APPELLANT,
v.
ROBERTS, APPELLEE.

WALLACE, circuit judge:

This appeal presents for review an order of the circuit court of the United States for the southern district of New York dismissing a writ of habeas corpus. The writ was obtained in behalf of Oberlin M. Carter on a petition alleging that the relator was unlawfully imprisoned pursuant to a sentence of a court-martial.

It appears by the record that the relator, as a captain in the Corps of Engineers, United States Army, was convicted by the court-martial of four different offenses committed by him while in the military service of the United States, viz: Conspiring to defraud the United States, in violation of the Sixtieth Article of War; causing false and fraudulent claims to be made aganist the United States, in violation of the Sixtieth Article of War; conduct unbecoming an officer and a gentleman, in violation of the Sixty-first Article of War, and embezzlement, as defined

in section 5488, Revised Statutes of the United States, in violation of the Sixty-second Article of War. He was thereupon sentenced by the court-martial to suffer a fine of $5,000; to be imprisoned at hard labor for five years; to be dismissed from the service of the United States, and to the publication of his crime and punishment as prescribed by statute upon a dismissal for fraud. The findings and sentence of the court-martial were approved by the Secretary of War and confirmed by the President; and before the institution of the proceedings under review the relator had paid the fine imposed by the sentence, and had been dismissed from the service of the United States.

It is not the office of a writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed, but if this exists, however erroneous the proceedings may be, they can not be reviewed collaterally or redressed by habeas corpus. These principles have been repeatedly declared by the authorities. *In re Davidson* (21 Fed. Rep., 618); *Ex parte Reed* (100 U. S., 13); *In re Coy* (127 U. S., 731); *Ex parte Yarbrough* (110 U. S., 651); *United States* v. *Pridgeon* (153 U. S., 59).

It is not contended for the appellant that the court-martial did not have jurisdiction of the person of the

accused, and of the offenses of which he was convicted, but it is insisted that the court transcended its power in the imposition of punishment. More specifically, the contention for the appellant is that, while it was within the competency of the court-martial to try and punish the relator for the offenses in violation of the Sixtieth Article of War of which he was convicted, the court exceeded its authority when it punished him by fine and imprisonment instead of fine or imprisonment; and that the conviction and sentence for the offense alleged to be in violation of the Sixty-second Article of War were void because the facts charged did not constitute an offense against that article.

If the sentence was in excess of the authority conferred upon the court by the articles of war enacted by Congress it was to that extent void, as the court would have gone beyond its jurisdiction in imposing punishment. On the other hand, if the authority of the court extended to the punishment of the relator by fine and imprisonment upon his conviction of the two offenses in violation of the Sixtieth Article of War, the sentence defeats any remedy by the writ of habeas corpus, as that remedy reaches only cases of unlawful imprisonment, and it matters not for present purposes whether the authority of the court extended to his conviction and sentence for any other offense. There being no statutory direction upon the subject, usage permits an indefinite number of offenses to be adjudicated together in one proceeding by courts-martial, and the rendition of a single sentence covering all the convictions and imposing punishment accordingly, however separate and distinct may be the different offenses, and however different may be the punishments prescribed for them; 1 Winthrop, Military Law, 2d ed. (219, 614); Davis, Military Law (148, 689). It follows that if the sentence is warranted by a conviction of two

offenses, it is justified to the extent that such offenses are punishable.

The Sixtieth Article of War declares among other things that a person in the military service of the United States "who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance of any false or fraudulent claim," or "who makes, or causes to be made, any claim against the United States, or any officer thereof knowing such claim to be false or fraudulent," * * * "shall on conviction thereof be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge." The article, besides the two offenses mentioned, defines disjunctively eight others, and the language prescribing the punishment is contained in a concluding clause at the end of the enumeration. We entertain no doubt that the concluding clause is to be read distributively and applies to each of the ten enumerated offenses; and that a person convicted of two or more of the ten offenses is by its terms punishable for each by fine or by imprisonment, or by such other punishment as the court-martial may adjudge. Any other construction would attribute to Congress the intention to ignore any distinction between degrees of guilt in punishing crime, and to subject a person guilty of one offense to the same measure of punishment as one guilty of several or of all of the ten offenses.

As has been stated, the relator was convicted of two of the offenses defined by the Sixtieth Article of War. The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges, or the evidence supports the specifications we are not at liberty to consider. Nor is it open to inquiry whether the two offenses were, in fact, but one and the same

criminal act. When properly constituted and convened a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the Articles of War. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offenses, whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the Supreme Court in *Dynes* v. *Hoover* (20 How., 65), the sentence (when confirmed by the President) "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise." Having found the relator to be guilty of two offenses, the court was empowered by the statute to punish him as to one by fine, and as to the other by imprisonment. The sentence was not in excess of its authority.

It is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the Articles of War. The conviction of conduct unbecoming an officer and gentleman was for an offense in violation of article 61; and that article requires that upon conviction the officer be dismissed from the service. The punishment by publication of his crime was authorized by article 100, which provides for such punishment when an officer is dismissed from the service for cause. It is also proper to state that Congress can, if it sees fit, carve out two or more offenses from a single criminal transaction, and impose cumulative punishments for the different offenses (*Commonwealth* v. *Trickey*, 95 Mass., 559; *United States* v. *Harmison*, 3 Sawyer, 556); and if the court-martial convicted the relator of several offenses

for a single criminal transaction it did not transcend necessarily the power conferred by the Sixtieth Article of War.

The appellant has urged the proposition that the relator, having been dismissed from the service, was not thereafter amenable to military authority. If by this it is meant to be said that he was no longer lawfully in custody under the sentence of imprisonment, the proposition has not sufficient color of merit to require discussion.

In dismissing the writ the court below expressed the opinion that the relator was properly convicted by the court-martial of an offense in violation of the Sixty-second Article of War, and that the sentence of imprisonment was supported by such conviction. Without intending to impugn the correctness of this conclusion, we have not considered the question, because in the view we have reached it does not arise. The relator was lawfully restrained of his liberty by the sentence and commitment pursuant to it, because the sentence was warranted both as to fine and imprisonment by his conviction of one offense subjecting him to punishment by fine, and of another subjecting him to punishment by imprisonment, and both in violation of the Sixtieth Article of War.

The order dismissing the writ of habeas corpus is affirmed, with costs.

O

CARTER *v.* ROBERTS.

APPEAL FROM AND ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 570. Submitted April 9, 1900. — Decided April 23, 1900.

Captain Carter, of the corps of engineers, in the army of the United States, was duly and regularly tried before a legally convened court martial, was found guilty of the charges made against him, and was sentenced to dismissal; to be fined; to be imprisoned; and to publication of crime and punishment; and the sentence was duly approved and confirmed. On a motion in his behalf the United States Circuit Court for the Second Circuit issued a writ of *habeas corpus*, to inquire into the matter, which resulted in the dismissal of the writ, and the remanding of Carter to custody. He took an appeal to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment below, and this court denied an application for a writ of certiorari to review that judgment. An appeal and writ of error was allowed on the same day by a Judge of the Circuit Court to this Court. *Held*, That the appeal and writ of error could not be maintained, as they fall directly within the ruling in *Robinson* v. *Caldwell*, 165 U. S. 359, where it was held that the judiciary act of March 3, 1891, does not give a defeated party in a Circuit Court the right to have his case finally determined both in this court and in the Circuit Court of Appeals on independent appeals.

When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

THESE were motions to dismiss or affirm. The case is stated in the opinion of the court.

Mr. Solicitor General for the motions.

Mr. Abraham J. Rose and *Mr. Benjamin F. Tracy* opposing.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Opinion of the Court.

Carter was a captain of the United States Army, assigned to the corps of engineers. He was arraigned and tried before a court martial in Savannah, Georgia, convened according to law, upon certain charges and specifications; found guilty; sentenced to dismissal; to suffer a fine; to be imprisoned; and to publication of crime and punishment. This sentence was approved by the Secretary of War and confirmed by the President of the United States, September 29, 1899, and the Secretary of War took the necessary action for the execution of the sentence. October 2, 1899, Carter obtained from the Circuit Court of the United States for the Southern District of New York a writ of *habeas corpus*, directed to the military authority having him in custody, for his production before the court, together with the time and cause of his detention. He was accordingly produced, and due return made, setting up that he was lawfully held in custody by authority of General Orders No. 172, of September 29, 1899. During the pendency of the *habeas corpus* proceedings the fine imposed was paid. The Circuit Court dismissed the writ, and Carter was remanded to custody. 97 Fed. Rep. 496.

From this final order, as appears from the records of this court, and is conceded, petitioner prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit. The case having been there heard, that court, on January 24, 1900, entered judgment affirming the judgment of the Circuit Court, with costs. On February 5, 1900, an application for the writ of certiorari to the Circuit Court of Appeals was made to this court, which, on February 26, 1900, was denied. 176 U. S. 684.

On the same day an appeal from the final order of the Circuit Court directly to this court was allowed by a Judge of the Circuit Court, as also a writ of error.

The eighth section of Art. I of the Constitution provides that the Congress shall have power "to make rules for the government and regulation of the land and naval forces," and in the exercise of that power Congress has enacted rules for the regulation of the army known as the Articles of War. Rev. Stat. § 1342. Every officer, before he enters on the duties of his

office, subscribes to these articles, and places himself within the power of courts martial to pass on any offence which he may have committed in contravention of them. Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

The ground for an appeal directly to this court is said in the briefs to be that the case involved the construction or application of the Constitution, in that by the sentence petitioner was twice punished for the same offence. But if the statutes authorized the penalties in question to be inflicted in one and the same proceeding as punishment for the offences charged, then there was no double punishment. And, as this was a case arising in the land forces it is hardly to be conceded that the suggested constitutional objection was raised below as such by the bare averment in the petition that petitioner, having suffered the punishment of dismissal and of publication, his "imprisonment is without authority of law," and "his further punishment and detention," and "the carrying out of said sentence, is contrary to law and the provisions of the Constitution of the United States, and is illegal."

The Circuit Court stated the questions thus: "The contention of the relator is that, conceding that the court martial had jurisdiction of the person of the accused and of the offences charged, and conceding, further, the regularity of its proceedings, and the propriety of its findings, it was without power to impose the four separate punishments of dismissal, fine, imprisonment and degradation (special publication of sentence), although it might have imposed either one of them. When application was made for the writ, it appeared that the first punishment (dismissal from the service of the United States) and the fourth (publication of sentence) had been carried out; and the relator contended that, having thus paid a penalty which the court had power to inflict, he could not be held to submit to another pen-

alty, which the court had no power to add to the one already by it selected. Since the return was made the relator has also paid the fine, and, although that fact does not appear upon the face of the original papers, it has been discussed in the briefs of both sides, and is now embodied in a stipulation, thus completing the case.

"If the relator's premises be sound, viz., that punishments have been imposed in the aggregate, when the statute authorized their imposition only in the alternative, his conclusion is supported by high authority. *Ex parte Lange*, 18 Wall. 163. In that case it was held that when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, and the judgment of the court thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offence is at an end. The important question in the case, therefore, is whether under the statutes of the United States, the court martial had the power, under its findings, to impose a sentence inflicting these four penalties." And the court, after considering that question at length, held that the court martial had such power.

We need not discuss, however, whether a direct appeal could have been taken in the first instance, as we are of opinion that, even if so, the present appeal cannot be maintained. It falls directly within the ruling in *Robinson* v. *Caldwell*, 165 U. S. 359. It was there held that the judiciary act of March 3, 1891, does not give a defeated party in a Circuit Court the right to have his case finally determined both in this court and in the Circuit Court of Appeals on independent appeals. That case was heard in the Circuit Court of the United States for the District of Idaho upon its merits, which included the consideration of questions involving the construction of a treaty and the validity of an act of Congress. Judgment passed for plaintiff, and defendant was allowed a direct appeal to this court. Pending this, defendant had also prosecuted an appeal to the Circuit Court of Appeals, and the case was there again heard and determined. 29 U. S. App. 468. When subsequently the appeal to this court was heard, it was dismissed, because we held that

we could not properly retain cognizance thereof in face of the fact that the case had been adjudicated by the Court of Appeals, whose judgment remained undisturbed.

Pullman's Palace Car Company v. *Central Transportation Company*, 171 U. S. 138, is not to the contrary. The Pullman Company had taken an appeal directly from the Circuit Court to this court, on the theory that the case involved the construction or application of the Constitution, and had also taken an appeal to the Circuit Court of Appeals for the Third Circuit. The Circuit Court of Appeals overruled a motion to dismiss, but postponed further argument until the appeal to this court was disposed of. 39 U. S. App. 307. A motion to dismiss was also made in this court, whereupon an application was made for a writ of certiorari to the Circuit Court of Appeals, and, by reason of the circumstances, was granted, and the record returned by virtue of that writ. And we proceeded to dispose of the case on the merits without passing on the question, which had become immaterial, whether the direct appeal could have been maintained or not.

The case before us presents no such features. It has been regularly heard and gone to judgment in the Circuit Court of Appeals, and an application duly made to this court for certiorari has been denied. These prior proceedings cannot be ignored and the cause brought here as if they had not been had.

When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. *Holt* v. *Indiana Manufacturing Company*, 46 U. S. App. 717; 176 U. S. 68; *United States* v. *Jahn*, 155 U. S. 109; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Benjamin* v. *New Orleans*, 169 U. S. 161. But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891.

Appeal and writ of error dismissed.